TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 115

THE CITY OF NEW ALBANY, APPELLANT,

vs.

JOHN PHELPS PUTNAM, HEMAN ELY, HEMAN ELY, EXECUTOR OF C. ARTHUR ELY, DECEASED, AND STEPHENSON BURKE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED DECEMBER 6, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 313.

THE CITY OF NEW ALBANY, APPELLANT,

vs.

JOHN PHELPS PUTNAM, HEMAN ELY, HEMAN ELY, EXECUTOR OF C. ARTHUR ELY, DECEASED, AND STEPHENSON BURKE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house in the city of Indianapolis on the first Tuesday in May, in the year of our Lord one thousand eight hundred and sixt-nine, before the Honorable David McDonald, judge of the district court of the United States for the district aforesaid.

JOHN PHELPS PUTNAM, HEMAN ELY, Heman Ely, executor of the last will and testament of C. Arthur Ely, deceased, and Stevenson Burke

v.

THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, the City of N. Albany, Thomas L. Smith, John D. McDonald, Jesse J. Brown, (survivor of James Brooks,) John S. Davis, Ezekiel R. Day, Silas C. Day, Benjamin F. Scribner, Horatio N. Duval, Thomas Danforth, Franklin Warren, William S. Culbertson, John B. Crawford, Ephriam L. Whistler, William Lockmiller, John Knefley, Bela C. Kent, Alexander Kent, Michael C. Kerr, Isaac
2 P. Smith, John H. McMahan, Lawrence Bradley, James Montgomery, Samuel Montgomery, Asahel Claff, George V. Howk, John B. Anderson, Bradford E. Scribner, James Johnson, John F. Anderson, John B. Winstandly, and Jesse Brown and John B. Winstandly, executors of John Brown, deceased, and Augustus Bradley.

} 1297.—Chancery.

Be it remembered that heretofore, to wit, on the 29th day of January, A. D. 1868, the complainants herein, by Mess. Porter, Harrison, and Fishback, their solicitors, filed in the office of the clerk of said court their bill in chancery in the cause above entitled in the words and figures following, to wit:

To the honorable judges of the circuit court of the United States for the district of Indiana:

John Phelps Putnam, of the city of Boston, and a citizen and resident of the State of Massachusetts, Heman Ely, of Elyria, Lorain Co., Ohio, and a citizen and a resident of the State of Ohio, who sues and brings this bill of complaint for himself personally, and also as executor of the estate of C. Arthur Ely, late deceased, of said Elyria, who was at
3 the time of his decease, and during his whole life, a citizen of the State of Ohio, and Stevenson Burke, a resident of Elyria aforesaid, and a citizen of the State of Ohio, bring this their bill of complaint against the New Albany and Sandusky City Junction Railroad Company, a corporation created by the laws of the State of Indiana, and having its only office and place of business therein, and being a citizen of said State of Indiana. The city of New Albany, a municipal corporation created by the laws of the State of Indiana, and existing in the county of Floyd, in said State of Indiana, and a citizen of Indiana, Thomas L. Smith, John S. McDonald, Jesse J. Brown, survivor of James Brooks, John S. Davis, Ezekiel R. Day, Silas C. Day, Benjamin F. Scribner, Horatio N. Deval, Thomas Danforth, Franklin Warren, William S. Culbertson, John B.

Crawford, Ephriam S. Whistle, William Lockmiller, John Kneffley, Bela C. Kent, Alexander Kent, Michael C. Kerr, Isaac P. Smith, John H. McMahan, Lawrence Bradley, residents of Floyd County Indiana, and citizens of said State of Indiana; also James Montgomery, Samuel Montgomery, Walter Maun, Asabel Claff, George V. Howk, John B. Anderson, Bradford E. Scribner, James Johnson, John F. Anderson,
4 John B. Winstandly, and Jesse Brown and John B. Winstandly, the two latter as executors of John Brown, late of New Albany, deceased, and Augustus Bradley, all of said Floyd County, and citizens of the State of Indiana, and residents thereof.

And, therefore, your orators complain and say that on the 14th day of November, A. D. 1857, William S. Pearson, jr., and Harry Seymour, then and still of the county of Hartford, Connecticut, and then and now citizens of said State of Connecticut, by the consideration of the circuit court of the county of Floyd, and State of Indiana, as trustees for said John Phelps Putnam, Sarah Coit Day, then in full life, but since deceased, Samuel J. Andrews and his wife Catharine D. Andrews, Rollin C. Dewitt, Elijah Dewitt, George R. Starr, Horace C. Starr, Heman Ely, C. Arthur Ely, and Augustus H. Mass, recovered a judgment against the said New Albany and Sandusky City Junction Railroad Company for the sum of fifty-four thousand eight hundred and fifty-five dollars, and costs of suit taxed at one thousand fifty-one and $\frac{60}{100}$ dollars; that said sum of fifty-four thousand eight hundred and fifty-five dollars was rec*eived*[overed] by said Pierson and Seymour as trustees
5 aforesaid for the cestui que trusts aforesaid against the New Albany and Sandusky City Junction Railroad Company aforesaid, in the proportions and amount following, to wit: for the use of said John P. Putnam, the sum of six thousand two hundred and ten dollars, ($6,210;) for the use of Samuel J. Andrews and wife, the sum of three thousand one hundred and five dollars, ($3,105;) for the use of said Sarah Coit Day, the sum of five thousand one hundred and seventy-five dollars, ($5,175;) for the use of said Elijah Dewitt, the sum of seven thousand two hundred and forty-five dollars, ($7,245,) for the use of Rollin C. Dewitt, the sum of five thousand one hundred and seventy-five dollars, ($5,175,) for the use of said George R. and Horace C. Starr, jointly, the sum of four thousand one hundred and forty dollars, ($4,140;) for the use of said Heman Ely, the sum of eight thousand two hundred and eighty dollars, ($8,280;) for the use of said C. Arthur Ely, fourteen thousand four hundred and ninety dollars, ($14,490;) and for the use of Augustus H. Mass, the sum of one thousand and thirty-five dollars, ($1,035.)

Your orators further say that said Sarah Coit Day, at the rendition of said judgment, and up to the time of her decease, was a resident
6 and citizen of the State of Connecticut; that she died on or about the first day of November, A. D. 1863, and that Thomas M. Day, of Hartford, Connecticut, and a citizen of said State of Connecticut, has been duly appointed and qualified, and is now the sole executor of the estate of said Sarah Coit Day; that said Samuel J. Anderson and wife, at the rendition of said judgment, were, and still are, residents and citizens of said State of Connecticut; and that said Elijah Dewitt, Rollin C. Dewitt, George R. Starr, Horace C. Starr, and Augustus H. Mass, then were and still are residents and citizens of the State of Ohio.

Your orators further say that so much of said judgment as belonged to said George R. and Horace C. Starr, and was recovered for their use and benefit, has been duly assigned to and is now owned by said Heman Ely, and that so much of said judgment as was recovered for the

nse of said Sarah Coit Day, Samuel J. Andrews and wife, Elijah Dewitt, Rollin C. Dewitt, and Augustus H. Mass, amounting to twenty-one thousand seven hundred and thirty-five dollars ($21,735,) has been duly assigned, sold, and transferred to said Stevenson Burke, and he is now the sole owner and holder thereof.

7 Your orators further say that said judgment is in full force and effect unreserved and unsatisfied, and that nothing has been paid thereon except as hereinafter specified.

Your orators further say that said judgment was recovered in a suit brought in said circuit court of Floyd County by one Victor A. Peffin, pl'ff, against said New Albany and Sandusky City Junction Railroad Company, William S. Pierson, jr., and Harvey Seymour, trustees, and James Montgomery, John S. Davis, William M. Weir, John S. McDonald, Thomas L. Smith, John B. Windstandly, Samuel H. Patterson, Charles Bowman, Charles Howard, Sebre Howard, Charles B. Applegate, Walter Mann, and William B. Lent, were defendants; that said action was brought by said Peffin to recover the amount due him upon certain bonds issued by the said railroad company, known as the real estate bonds of said company, said real estate bonds being all for one thousand dollars each, ($1,000,) and in all being one hundred and ten bonds of the same date and amount, all of which, by reason of a failure of the railroad company to pay the interest as it fell due thereon, fell

8 due on the first day of July, 1857, and by consent of the said railroad company in open court judgment was rendered upon fifty-three of said bonds in favor of said Pierson and Seymour as trustees for the above-named cestui que trusts for the sum of ($54,855) fifty-four thousand eight hundred and fifty-five dollars, and costs of suit; and said court then and there ordered, adjudged, and decreed that the mortgage or deed of trust executed and delivered to said Seymour and Pierson as trustees to secure the payment of said one hundred and ten bonds, should be foreclosed and the premises sold, and, after the payment of the costs of said action, the proceeds of such sale should be applied upon said judgment of fifty-four thousand eight hundred and fifty-five dollars, ($54,855,) and judgment in said action then rendered in favor of the other holders of said bonds in proportion to the amount found due each.

Your orators further say that an order of sale of said mortgaged premises was made and issued by said Floyd circuit court in accordance with the laws of the State of Indiana, and that under said order

9 of sale all the real estate embraced in said mortgage or trust-deed was advertised and sold according to law, and the proceeds of said sale were distributed among the holders of said bonds in proportion to the amount found due to each upon said bonds, and that there was made by said sale and applied upon said judgment of fifty-four thousand eight hundred and fifty-five dollars ($54,855,) so recovered by said trustees, only the sum of thirteen thousand three hundred and sixty-eight dollars and eighty-three cents; that the entire balance of said judgment remained due and unpaid; that return of said sale was duly made to said circuit court of Floyd County at its May term, 1858, and execution was duly awarded by said court on the 24th day of May, 1858, against said railroad company, to collect the balance due on said judgment; that said real estate was sold and proceeds applied on the 30th day of March, 1858; and that for principal and interest on said judgment of fifty-four thousand eight hundred and fifty-five dollars ($54,855) so recovered by said trustees, there was due on the 30th day of March, 1858, the sum of fifty-six thousand and eighty-nine dol-

10 lars and twenty-four cents, ($56,089 24,) besides costs of suit, and

that after deducting from said sum so due the said sum of thirteen thousand three hundred and sixty-eight dollars and eighty-three cents, ($13,368 83,) so made from the sale of said mortgaged premises, there remains due upon said judgment so owned by your orators the sum of forty-two thousand seven hundred and twenty-dollars and forty-one cents ($42,720 41) and costs, the costs and increase costs amounting to seventeen hundred and twenty-five dollars and sixty-three cents, ($1,725 63.)

Your orators further say that they have caused execution to be issued to the sheriff of said Floyd County to collect the balance of said judgment so due to them as aforesaid, which execution has been by said sheriff returned unsatisfied, and no money made thereon, and said sheriff returned that, after making due and diligent search for goods and chattles, lands and tenements, wherewith to satisfy said execution, he could find none.

Your orators further say that at the rendition of said judgment said railroad company was insolvent, and utterly unable to pay its
11 debts, and that said railroad company has ever since been and still is utterly insolvent, and has no real or personal property, or money, wherewith to pay its debts, or any part thereof.

Your orators further say that, in the years 1855 and 1856, said railroad company undertook to build its road, and performe considerable work thereon in grading and otherwise, but that they never put any part of their road in operation, nor laid any of the track thereof, and that on or about the 30th day of April, 1857, being utterly insolvent, and having expended all its means in endeavoring to build its road, said company abandoned all further efforts to build the same and all work thereon, since which time their road bed and right of way has been sold upon its indebtedness; and since the year 1858 the said railroad company has not kept up its organization, nor elected any new officers, but that James Montgomery, of the city of New Albany, Indiana, was the last president thereof, and still, for the purposes of closing up the business of said company, is president thereof, and Thomas L. Smith, esq., also of said New Albany, is the acting attorney of said company.

12 Your orators further say that said city of New Albany is indebted to said railroad company in the sum of three hundred and ninety-three thousand dollars, with interest thereon payable semi-annually at six per cent. from the first day of January, A. D. 1856, and that the principal of said indebtedness will fall due on or about the first day of January, A. D. 1874; that said indebtedness of said city of New Albany to said railroad company arose as follows: that on the 19th day of November, 1853, the said city, by its mayor, duly subscribed to the capital stock of said railroad company the sum of four hundred thousand dollars, to be paid in the six (6) per cent. bonds of said city, the bonds to draw interest payable semi-annually in the city of New York; that said city in part payment of its said subscription of four hundred thousand dollars ($400,000) executed, issued, and delivered to said company two hundred bonds of one thousand dollars each, numbered from one to two hundred inclusive; that said bonds had interest warrants or coupons attached to each for the interest at six (6) per cent. accruing
13 thereon and payable every six months—that is to say, each of said bonds had thirty-nine coupons, of thirty dollars each coupon, and falling due respectively every six months until the bonds mature, and the bonds were and are to mature and fall due on or about the first day of January, 1874; that said two hundred bonds were delivered to said railroad company as follows: between the 25th day of March and the

9th day of June, 1854, one hundred bonds, and on the first day of January, 1856, one hundred more of said bonds of $1,000 each, numbered from one hundred and one to two hundred inclusive, all of said bonds drawing interest and bearing coupons as above mentioned, and all falling due in the year 1874; that, not having possession of said bonds, or any of them, nor being able to see them, your orators are unable to give a more definite description thereof.

Your orators further say that none of said interest has been paid, and that more than the sum of seventy thousand dollars for interest accrued upon said bonds is now due to said railroad company from said city of New Albany.

14 Your orators further say that said city of New Albany is also indebted to said railroad company in the sum of two hundred thousand dollars for the balance of its subscription to said capital stock, together with the interest thereon from the first day of January, A. D. 1856; that said city of New Albany has never paid said subscription, nor said bonds, nor interest, nor any part thereof, except such sums of interest as fell due before January 1, 1856, and the interest upon seven of said bonds; but that, by some pretended arrangement or compromise made between said city and said railroad company, after said railroad company became insolvent, said city obtained possession of said bonds and procured an attempted cancellation of said subscription; but which arrangement and compromise and attempted cancellation of said subscription your orators aver to be entirely null and void, and to have been made without authority of law, and they say that said indebtedness of said city to said railroad company still subsists in full force.

15 Your orators further say that said subscription made by said city for said four hundred thousand dollars of capital stock was legal in all respects, and that said bonds were legally issued in payment for the said railroad stock so subscribed for by said city, and by said subscription said city became a legal stockholder in said railroad company to the amount of four hundred thousand dollars, ($400,000.)

Your orators further say that Thomas L. Smith, John S. Davis, Jesse J. Brown, (survivor of James Brooks,) John L. McDonald, Ezekiel R. Day, Silas C. Day, Benjamin F. Scribner, Horatio N. Duvol, Thomas Danforth, Franklin Warren, William S. Culbertson, John B. Crawford, Phineas M. Kent, John B. Anderson, Bela C. Kent, and Alexander Kent, John B. Winstandly, personally, and Jesse B. Brown and John B. Winstandly as executors of the estate of John Brown, late of said city of New Albany, deceased, and Augustus Bradly, are each endebted to said railroad company upon subscription to its capital stock at the time of the incorporation of said company in the sum of four thousand and seven hundred dollars, [each,] which several sums of money, together with the interest thereon from the first day of January, 1855, is due and payable from each of them to said railroad company.

16 Your orators further say that said defendants James Montgomery, Samuel Montgomery, Benjamin F. Scribner, Horatio N. Duval, Thomas Danforth, Franklin Warren, Walter Mann, Asabel Claff, George V. Howk, Ephriam S. Whistle, Bradford E. Scribner, William Lockmiller, James Johnson, John F. Anderson, John Knefley, Michael C. Kerr, Isaac P. Smith, Augustus Bradly, John H. McMahan, and Lawrence Bradly are each and all of them severally indebted to said railroad company upon subscription to its capital stock in the sum of twenty-two hundred dollars, [each,] with interest from the first day of January, 1855, all which several sums of money are now due and payable to said railroad company.

Your orator Heman Ely further says that said C. Arther Ely died on or about the first day of July, A. D. 1869[5], and that he has been duly appointed and qualified as executor of his estate, and that he is still such execta[o]r.

Your orators therefore pray that process may duly issue in this case; that said railroad company, The City of New Albany, Thomas L.
17 Smith, John S. McDonald, Jesse J. Brown, survivor of James Brooks, John S Davis, Ezekiel R. Day, Silas C. Day, Benjamin F. Scribner, Hratio N. Duval, Thomas Danforth, Franklin Warren, William S. Culbertson, John B. Crawford, Ephriam S. Whistle, William Lockmiller, John Knefley, Bela C. Kent, Alexander Kent, Michael C. Kerr, Isaac P. Smith, John H. McMahan, Laurence Bradley, James Montgomery, Samuel Montgomery, Walter Mann, Asahel Claff, George V. Howk, John B. Anderson, Bradford E. Scribner, James Johnson, John F. Anderson, John B. Winstandly, personall, and Jesse Brown and John B. Winstandly, as executors of John Brown and Augustus Bradly, may be duly notified of the pendancy and prayer of this bill, and required to answer the same; that the balance of said judgment due to your orators, and the interest thereon, may be ascertained, and that the amount due and owing by said city of New Albany and said other debtors of said railroad company may be ascertained, and that enough of said several sums of money so found due to said railroad company may be ordered to be applied upon the indebtedness of
18 said company to your orators above set forth to satisfy and discharge the same, together with the costs; and that such other and further relief may be granted and decree rendered as justice and equity require.

JOHN PHELPS PUTNAM.
HEMAN ELY.
HEMAN ELY,
As Executor of C. Arther Ely, Deceased.
STEVENSON BURKE.

PORTER, HARRISON & FISHBACK,
Att'ys for Complainants.

And thereupon there was issued out of said clerk's office a subpœna in chancery in the above-entitled cause in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Indiana:

The President of the United States of America to the marshal of the district of Indiana, greeting:

You are hereby commanded to summon The New Albany and Sandusky City Junction Railroad Company, The City of New Albany, Thomas L. Smith, John S. McDonald, Jesse J. Brown, (survivor of James Brooks,) John H. Davis, Ezekiel R. Day, Silas C. Day, Benjamin F. Scribner,
19 Horatio N. Deval, Thomas Danforth, Franklin Warren, William S. Culbertson, John B. Crawford, Ephriam S. Whistler, William Lockmiller, John Kneffley, Bela C. Kent, Alexander Kent, Michael C. Kerr, Isaac P. Smith, John H. McMahan, Lawrence Bradley, James Montgomery, Samuel Montgomery, Walter Mann, Asahel Claff, George V. Howk, John B. Anderson, Bradford E. Scribner, James Johnson, John F. Anderson, John B. Windstandly, and Jesse Brown and John B. Winstandly, the two latter as executors of John Brown, late of

Floyd County, in said district, deceased, and Augustus Bradley, citizens of and residents in the State of Indiana, if they be found in your district, to be and appear in the circuit court of the United States for the district of Indiana aforesaid, at Indianapolis, on the first Monday in March next, to answer a certain bill in chancery filed and exhibited in said court against them by Herman Ely, (for himself and as executor of the will of C. Arthur Ely, late resident of the State of Ohio, deceased,) citizen and resident of the State of Ohio; John Phelps Putnam, citizen and resident of the State of Massachusetts; and Stevenson Burke, a citizen of and resident in the State of Ohio. Hereof they are not to fail under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the Honorable S. P. Chase, Chief Justice of the United States, this 29th day of January, A. D. 1868, and in the 92d year of the independence of the United States of America.

[SEAL.] Attest: JOHN D. HOWLAND, *Clk.*

MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of March, 1868; otherwise the said bill may be taken pro confesso.

J. D. HOWLAND, *Clerk.*

And afterwards, to wit, on the 3d day of March, A. D. 1868, the marshal of said district returned into said clerk's office the said subpœna in chancery, with the following return endorsed thereon, to wit:

Feb'y 10th, 1868, I served the within by reading the same to Jesse B. Brown, for himself and as exécutor of John Brown, Lawrence Bradley, Augustus Bradley, Thomas Danforth, John McMahan. Feb'y 11th, 1868, served by reading to William S. Culbertson, John S. Davis, E. R. Day, H. N. Devol, James Johnson, John Kneffly, John J. McDonald, B. C. Kent, Franklin Warran, Sanderson, mayor of New Albany, and , city clerk of N. Albany; and by reading to, and copy left with, Thomas L. Smith, for himself, and as secretary of the N. A. and Sandusky City Junc. R. R. Co., Isaac S. Smith, John F. Anderson, Walter Mann, and E. J. Whistler, and copy left at the residence of S. C. Day, J. B. Crawford, M. C. Kerr, Samuel Montgomery, and James Montgomery for himself and as president of the N. A. and S. City Junc. R. R. Co., and also Geo. V. Howk, by reading to John B. Winstandly for himself and as ex. of John Brown, and Benj. F. Scribner, William Lockmiller, J. B. Anderson; Asahel Claff not found in my district; Alx. Kent and B. R. Scribner not served for want of time.

BENJ. SPOONER, *U. S. Marshal*,
By H. N. BIGELOW, *Dep'ty.*

And afterwards there was issued out of said clerk's office an alias subpœna in chancery in the above-entitled cause for Alexander Kent and E. B. Scribner in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Indiana:

The President of the United States of America to the marshal of the district of Indiana, greeting:

You are hereby commanded to summon Alexander Kent and E. B.

Scribner, citizens of and residents of the State of Indiana, if they
22 be found in your district, to be and appear in the circuit court of the United States for the district of Indiana aforesaid, at Indianapolis, on the first Monday in April next, to answer a certain bill in chancery filed and exhibited in said court against them and sundry other defendants by Heman Ely and Stevenson Burke, citizens of the State of Ohio, and John Phelps Putnam, citizen of and resident in the State of Massachusetts. Hereof they are not to fail under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the United States, this 7th day of March, A. D. 1868, and in the 92 year of the independence of the United States of America.

[SEAL.] Attest: J. D. HOWLAND, *Clerk.*

MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of April, 1868; otherwise the said bill may be taken pro confesso.

J. D. HOWLAND, *Clerk.*

And afterwards, to wit, on the 26th day of March, A. D. 1868, the marshal of said district returned into the said clerk's office the said
23 subpœna in chancery with the following return endorsed thereon, to wit:

March 13th, 1868, I served the within subpœna as commanded by leaving a copy at the last usual place of residence of E. B. Scribner.

BEN. SPOONER, *U. S. Marshal,*
By JOHN C. SPOONER, *Deputy.*

March 20th, 1868, I served the within s'p'a by reading to and copy left with Alexander J. Kent.

BEN. SPOONER, *U. S. Marshal,*
By C. FRANKENBERGER, *Deputy.*

And afterwards, to wit, on the 27th day of February, A. D. 1868, the defendant Ezekiel R. Day, by Collins and Day, his solicitors, filed in the office of the clerk of said court his answer to said bill of complaint in the words and figures following, to wit:

Ezekiel R. Day, for seperate answer to said complaint, or to so much thereof as he is advised is material for him to make answer unto, answers and says:

1st. That he admits the organization of said New Albany and Sandusky City Junction Railroad Company, and that he subscribed for five thousand dollars ($5,000) of the stock of said company.

2d. He admits that said city of New Albany, by its corporate
24 authorities, subscribed for four hundred thousand dollars of the stock of said railroad company, of which said city has paid but a very small portion; only some eight thousand dollars or ten thousand dollars, ($8,000 or $10,000.)

3d. He knows nothing, except from hearsay, of said plaintiff's holding bonds, having sued upon them, obtained decree of foreclosure thereon, and having exhausted the property in mortgage for their security; nor does he otherwise know of any balance that may be due or coming from said railroad company to said plaintiffs, respectively.

He makes this answer a cross-complaint against his co-defendant, and charges:

1st. That said railroad company was organized in good faith, with a view to construct the improvements contemplated; that after subscribing for the five thousand dollars ($5,000) of stock in said company, he, the said E. R. Day, subscribed for, took, and paid for other stock in said railroad company, six hundred and twenty-two shares, (622,) making thirty-one thousand one hundred dollars, making his entire stock in said railroad company seven hundred and twenty-two shares, amounting to thirty-six thousand and one hundred dollars, of which he has
25 paid up six hundred and fifty-two shares, (652,) or thirty-two thousand six hundred dollars, leaving, of all his subscription to that stock, only three thousand five hundred dollars ($3,500) unpaid.

He charges that the affairs of said company were so managed that many of the stock subscribers were, like himself, required to pay up, and did fully pay up, and that others equally bound did not pay up in full, but paid only a very small portion of what they should have paid; that the said institution was so managed as to expend, for one purpose or another, all the money so paid in, without regard to who paid it; and in this way this defendant, with many others, did pay in a large amount of money more than an equitable proportion of what the company actually expended; that many of the largest subscribers only paid in three hundred dollars ($300) on five thousand dollars, ($5,000,) while this defendant paid in thirty-two thousand six hundred dollars ($32,600) on thirty-six thousand one hundred dollars, ($36,100,) and the co-defendant, "The City of New Albany," though a subscriber for four hundred thousand dollars, ($400,000,) only paid in some eight or
26 nine thousand dollars, ($8,000 or $9,000,) thereby making this defendant, and those acting like him, bear a disproportionate share of the burdens of said railroad company.

This defendant is not informed of the actual amount subscribed by his several co-defendants, but charges that he is informed and believes that the following other subscriptions were made, and that on no one of them was any payment made to exceed three hundred dollars, ($300,) to wit:

John S. Davis subscribed for 100 shares	$5,000
Thomas L. Smith, sr., 100 shares	$5,000
Brooks and Brown, 100 shares	$5,000
John S. McDonald, 100 shares	$5,000
Deval and Fordyce, 100 shares	$5,000
James Montgomery, 50 shares	$2,500
Samuel Montgomery, 50 shares	$2,500
Scribner and Deval, 50 shares	$2,500
Silas C. Day, 40 shares	$2,000
Thomas Danforth, 50 shares	$2,500
Franklin Warren, 40 shares	$2,000
John Bushnell, survivor of Plumer and Bushnell, 100 shares	$5,000
William Culbertson, 50 shares	$2,500
John B. Crawford, 40 shares	$2,000
Walter Mann, 40 shares	$2,000
Phineas M. Kent, 100 shares	$5,000
George V. Howk, 50 shares	$2,500
27 Ephriam S. Whistler, 20 shares	$1,000
Bradford E. Scribner, 20 shares	$1,000
John Loughmiller, 20 shares	$1,000
James Johnson, 20 shares	$1,000

Henry Lake, 20 shares	$1,000
John F. Anderson, 30 shares	$1,500
Peleg M. Wilcox, 50 shares	$2,500
John Kneffley, 40 shares	$2,000
Horatio N. Duval, 20 shares	$1,000
Bela C., Horace B., and Alexander J. Kent, as Kent & Bro's, 100 shares	$5,000
John B. Winstandley, 100 shares	$5,000
John Brown, 100 shares	$5,000
Michael C. Kerr, 20 shares	$1,000
Isaac P. Smith, 25 shares	$1,250
Augustus Bradley, 20 shares	$1,000
John McMahan and Laurence Bradley, as McMahan and Bradley, 50 shares	$2,500
Henry Beharrell, sr., 130 shares	$6,500

besides a number of others, whos names and the amount of whos subscription, when ascertained, he prays that they may be made def'ts hereto, and required to answer. But the said city of New Albany, and the subscribers already mentioned, on paying equally with this defendant, would entitle him to be reimbursed a large sum of money.

28 Others may be discovered by a proper officer, to be appointed by this court to take charge of the books and papers of said railroad company, to proceed to bring it into liquidation, and to adjust the equities of the stockholders, after paying off the just liabilities of said company. He makes Nelson Fordyce, of Putnam County, Phineas M. Kent, of White, and John Loughmiller, Horace Kent, Henry Beherrel, senior, all of Floyd County, defendants hereto, and prays that they may be summoned to answer this and the original complaint, and abide by the action of the court herein. In order whereto, will your honor be pleased to appoint a receiver herein, with instruction to take possession of the books, papers, rights, choses in action, and all matters pertaining to it, and to proceed to ascertain the liabilities thereof, and so to adjust the business of said company as to pay off its just liabilities and equalize the burdens and losses thereof according to equity among the stockholders, with other proper relief, etc.

COLLINS AND DAY,
For Def't.

DAY, *E. R.*

29 And afterwards, to wit, at the November term of said court, on the 28th day of March, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following proceedings in the above-entitled cause were had, to wit:

Now come the said several defendants to the bill herein, except J. B. Anderson and Asahel Claff, by their solicitors, Thomas L. Smith, esq., George V. Howk, esq., and Mess. Hendrick, Hood and Hendricks, and enter their appearance herein.

And afterwards, to wit, at the May term of said court, on the 26th day of June, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective solicitors, and the defendants now file their demurrer to said bill, which said demurrer is as follows:

The joint and several demurrer of The New Albany and Sandusky City Junction Railroad Company, The City of New Albany, Thomas L. Smith, John S. McDonald, Benjamin F. Scribner, Horatio N. Deval, Thomas Danforth, William S. Culbertson, John B. Crawford, Ephriam S. Whistler, Bela C. Kent, Alexander J. Kent, Michal C. Kerr, Isaac P. Smith, John H. McMahan, Laurence Bradley, James Montgomery, Samuel Montgomery George V. Howk, Bradford E.
30 Scribner, John F. Anderson, John B. Winstandly, Jesse J. Brown and John B. Winstandley, executors of John Brown, late of New Albany, deceased, and Augustus Bradley, part of the defendants to the bill of complaint of John Phelps Putnam, Heman Ely, for himself and as executor of the estate of C. Arther Ely, deceased, and Stevenson Burke, complainants.

The said defendants by protestation, not confessing or acknowledging all or any of the matters or things in the complainants' said bill of complaint to be true in such sort, manner, and form as the same are therein set forth and alleged, for answer to the said complainants' bill of complaint, these defendants, jointly and severally, do demur in law, and for cause of demurrer say:

That it appears by the plaintiffs' own showing in their said bill of complaint that they seek in this honorable court to enforce and collect a certain alleged judgment obtained by them against the said New Albany and Sandusky City Junction Railroad Company, in the Floyd circuit court, of the county of Floyd, and State of Indiana, a court possessed of the proper jurisdiction, and which said court, as it appears on the face of said bill of complaint, had assumed and fully ac-
31 quired jurisdiction of the subject-matter of this suit long before this suit was commenced, and was and is fully competent, under the laws of the said State of Indiana, to enforce and collect the said alleged judgment in the manner contemplated in said bill of complaint, under and by virtue of the provisions of the 23d article, entitled "Proceedings supplementary to execution," of an act of the general assembly of the State of Indiana, entitled "An act to revise, simplify, and abridge the rules, practice, pleadings, and forms in civil cases in the courts of this State, to abolish distinct forms of action at law, and to provide for the administration of justice in a uniform mode of pleading and practice, without distinction between law and equity," approved June 18, 1852.

Wherefore, and forasmuch as the complainants' said bill of complaint doth not contain, as these defendants are advised, any matter of equity sufficient to establish any right or demand against these defendants, or either of them, nor to draw them, or either of them, in suit into this honorable court, touching the matters complained of in the complainants' said bill of complaint; and also for many other errors and imperfec-
32 tions in the complainants' said bill of complaint contained, these defendants do demur in law thereto, and thereby crave the judgment of this honorable court, whether they ought to make any answer to the said bill of complaint; and these defendants, jointly and severally, pray to be hence dismissed with their costs in this behalf wrongfully sustained.

GEORGE V. HOWK,
THO'S L. SMITH,
HENDRICKS, HORD AND HENDRICKS,
Solicitors for said Defendants.

DISTRICT OF INDIANA, *sct:*

I, George V. Howk, of counsel for said defendants, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

GEORGE V. HOWK.

UNITED STATES OF AMERICA,
District of Indiana, County of Floyd, sect:

The said James Montgomery and George V. Howk, for themselves and on behalf of their said co-defendants, make oath and say that the foregoing demurrer is not interposed for delay, and further say not.

JAMES MONTGOMERY.
GEORGE V. HOWK.

STATE OF INDIANA, *Floyd County, sct:*

Subscribed and sworn to before me this 16th day of June,
33 1868.

Witness my hand and the seal of the Floyd circuit court.

[SEAL.] W. W. TULEY, *Clk.*

And said demurrer is now set down for hearing, and, after argument, the court takes the questions presented under advisement.

And afterwards, to wit, at the May term aforesaid of said court, on the 6th day of July, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by their respective solicitors, and the court doth thereupon sustain the demurrer of the defendants above named to the cross-bill of Ezekiel R. Day, and the said cross-bill is now dismissed; and thereupon the demurrer of the defendants to the complainants' bill of complaint is overruled, and the complainants have leave to amend their bill at any time before the first Monday of September next, and the defendants are ruled to answer said bill on that day; and it is ordered that said Day do pay the costs of his said cross-bill.

34 And afterwards, to wit, in vacation of said court, on the 7th day of September, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Now come The City of New Albany, and The New Albany and Sandusky City Junction Railroad Company, by Mess. T. L. Smith, George V. Howk, and Hendricks, Hord and Hendricks, and file there separate answers herein.

And also come now Thomas L. Smith and twenty-seven others, defendants herein, by the same solicitors, and file their answer herein.

And here follows the answer of The City of New Albany:

The answer of The City of New Albany to the bill of complaint filed against her and others by John Phelps Putman and others in said circuit court of the United States for said district of Indiana.

This defendant by protestation, not confessing all or any of the matters and things in the said complainants' bill contained to be true in manner and form as the same are therein set forth and alleged,
35 but specifically denying the same, except so far as the same are

hereinafter admitted and stated as true, for answer to the matters and things stated in said bill of complaint, or so much thereof as she is advised it is necessary and proper that she should answer unto, she answering, says:

That it is true that on or about the 18th day of November, in the year 1853, one Joseph A. Moffitt, then the mayor of said city, assumed for and on behalf of said city, and in her name, to subscribe for eight thousand (8,000) shares of the capital stock of said New Albany and Sandusky City Junction Railroad Company, at the price and amounting to the sum of four hundred thousand dollars.

Said assumed subscription was in writing, and was and is in substance as follows, to wit:

"*Subscription of stock to the New Albany and Sandusky City Railroad Company.*

["Copy.]

"Whereas an ordinance was passed by the mayor and common council of the city of New Albany on the 18th of November, 1853, by the 1st section of which the mayor of said city was authorized to subscribe in the name and on behalf of said city for eight thousand shares
36 of the capital stock of the New Albany and Sandusky City Junction Railroad Company, amounting to four hundred thousand dollars, to be paid for in bonds of said city of not less than one hundred dollars each, upon the call of said company:

"Now, therefore, I, Joseph A. Moffett, mayor of said city, do hereby, by virtue of the authority given me as aforesaid, subscribed for 8,000 shares of the stock of said railroad company in the name and on behalf of said city of New Albany, to be paid for as above provided by said ordinance.

"In testimony whereof I have hereunto subscribed my name as mayor of said city, and caused the seal of said city to be hereto affixed by the clerk this 19th of November, 1853.

"J. A. MOFFETT, *Mayor.*

"Attest: "E. SABIN, *City Clerk.*"

This defendant shows that the only pretended authority for said assumed subscription was a certain ordinance, therein referred to, of the common council of said city, passed on said 18th day of November, 1853; which ordinance was and is in substance, as follows, to wit:

"An ordinance authorizing the subscription of stock and the issue of bonds in and to The New Albany and Sandusky City Junction
37 Railroad Company, passed November 18, 1853.

"Whereas three-fourths of the legal voters of the city of New Albany have petitioned the common council of said city to subscribe for stock, to the amount not exceeding six hundred thousand dollars, in the New Albany and Sandusky City Junction Railroad Company, or in the Fort Wayne and Southern Railroad Company, incorporated to construct a railroad from New Albany to the State line of Ohio, making such subscription to the one or other of said companies, or apportioning it between said companies in such manner or proportions as shall be deemed most for the interest of said city, and to provide for the payment of the debt thus contracted in the manner provided by law: Therefore—

"SECTION 1. *It is ordained by the common council of the city of New Albany*, That Joseph A. Moffett, the mayor of said city, be authorized and directed to subscribe, in the name and behalf of said city, eight thousand (8,000) shares of the capital stock of the New Albany and Sandusky City Junction Railroad Company, amounting to the sum of four hundred thousand dollars, to be paid for in the bonds of said
38 city, of not less than one hundred dollars each, upon the call of said company, said bonds being payable in not less than ten nor more than twenty years after their respective dates, and bearing interest at the rate of six per centum per annum, and both principal and interest payable in the city of New York.

"SEC. 2. The mayor of said city of New Albany shall issue said bonds, with coupons for the interest, payable as aforesaid upon the call of said company, and deliver the same on the reception of the same amount of certificates of stock of said company, as they may from time to time receive the city bonds. And the said mayor is hereby authorized to sign the corporate name of said city to the bonds so issued by him, and attach thereto the seal of said city, which shall be attested by the city clerk, and for the payment of the interest and the final redemption of said bonds the faith of said city is hereby pledged.

"SEC. 3. The common council shall from year to year levy a tax sufficient to pay the annual interest on the debt hereby created, with an addition of not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof.

39 "SEC. 4. In preparing the tax duplicate of each year, the city clerk shall place the taxes levied under the last preceeding section in a seperate column, to be styled 'tax for railroad purposes,' and for all payments of such taxes the city treasurer shall issue to the person payin the same a certificate showing the amount of tax thus paid by such person, which certificate shall be assignable by endorsement..

"SEC. 5. Whenever an amount of such certificates equal to one share of the capital stock of said company, or more, at its par value, shall be presented to the mayor of said city, he shall transfer to the holder of such certificates such number of shares of such stock owned by said city as said certificates may amount to, and, if there should be a fraction over the proper amount, the said mayor shall issue to the holder a certificate for such fraction, which certificate shall be assignable in the same manner, and entitle the holder to the same rights as the certificates issued by the city treasurer.

"SEC. 6. Before the subscription of said stock and the delivery of said bonds, the following agreement, irrevocable, except by consent of
40 both parties thereto, shall be entered into by the city of New Albany and the New Albany and Sandusky City Junction Railroad Company:

"1. That all shares of stock transferred by said city in accordance with the provisions of the fourth and fifth sections of this ordinance shall be held and recognized by said railroad company as good and valid stock fully paid for.

"2. The New Albany and Sandusky City Junction Railroad Company shall pay to the city of New Albany, in stock of said company, an amount thereof equal at its par value to the amount of interest on the bonds of said city issued under the provisions of this ordinance, for the first three years after the date thereof, deducting therefrom any dividends that may be paid by the said railroad company to said city; the stock thus paid by said railroad company to be issued at such times as the said interest may become due.

"3. So soon as the board of directors of said New Albany and Sandusky City Junction Railroad Company shall accept of the foregoing agreement, and pass a by-law irrevocable to sustain the same, it shall be a contract to all intents and purposes, to be rescinded only, in
41 whole or in part, by the consent of the contracting parties.

"SEC. 7. This ordinance is to be in force from and after its passage."

This defendant shows that said common council assumed the power to pass said ordinance by virtue of the provisions of the 56th section of an act of the general assembly of the State of Indiana, entitled "An act for the incorporation of cities," approved June 18th, 1852, which act, including said section, was then in force, and the same constituted and was the only pretended authority for the passing of said ordinance, or the making of said subscription. But defendant says that neither said 56th section of said act, as the same has been construed by the final judgment of the supreme court of the said State of Indiana, nor any other law of said State, conferred any power upon said city or her common council or mayor to pass said ordinance or make said subscription, and that the same were and are utterly void; and respondent says that the recital in said ordinance, to the effect that three-fourths of the legal voters of said city had petitioned as therein stated, was and is
42 untrue, and that no petition by the legal voters of said city, or any of them, to said common council to contract said debt as contemplated by said 56th section of said act was ever at any time made.

This respondent says she is advised that it is pretended and claimed by said complainants and others that said unauthorized and void subscription of stock to said railroad company was, after said pretended making thereof, ratified by said common council pursuant to power conferred by a subsequent act of the general assembly of said State, entitled "An act to enable cities which have subscribed for stocks in companies incorporated to construct works of public utility under the 56th section of the general act for the incorporation of cities, and to ratify the same," approved February 21, 1855.

But respondent says that said unauthorized contract and subscription of stock has never been ratified by said common council, or by said city, pursuant to the authority conferred by said last-named act, or otherwise, and that the same remains and is void.

Respondent says she is advised and believes that, as against said
43 complainants, she is justly and equitably entitled to aver and show that said supposed subscription was and is void, and not her act, nor binding upon her, because she says that said complainants are not the holders of her negotiable paper, and that they never gave credit to said railroad company upon faith of her said pretended subscription to the stock of said company, and because they, at all times, well knew that said pretended subscription was unauthorized and void.

This respondent, further answering, says that, pursuant to the terms of said unauthorized ordinance and subscription, the proper officers and agents of said city did issue and deliver to said railroad company a large number of bonds purporting to be the corporate bonds of said city, to wit, two hundred bonds of one thousand dollars each, in payment of the calls upon said subscription. At the time said bonds were so issued and delivered said railroad company was actively engaged in the construction of its proposed railroad, and represented to the officers and authorities of said city that it was necessary to procure means by the sale of said bonds to prosecute said road to completion; but shortly

44 after said bonds were so issued and delivered, and before any of them had been sold or disposed of by said company, except seven of them for $1,000 each, suits were instituted in the Floyd circuit court of said State of Indiana by divers citizens of the city of New Albany to resist the payment of the tax levied by said common council for the payment of the interest thereon pursuant to the ordinance aforesaid, and praying for injunction to prevent the collection of said tax on the ground that said subscription had not been duly authorized by the petition of three-fourths of the legal voters of said city. These suits led to a very protracted litigation, and in the mean time the doubt thus cast upon the validity of the said bonds rendered it impossible for said railroad company to negotiate or sell them, except at a ruinous sacrifice. On the 17th of August, 1857, said railroad company represented to this respondant that, in consequence of her inability to sell or negotiate said bonds for the reason aforesaid, she was unable to procure means to prosecute her work, and had suspended and wholly abandoned all operations upon the work of said railroad; that she had expended all
45 the cash and real estate received in payment of stock, and had pledged the bonds so issued to her by this respondant to sundry persons for sundry amounts borrowed by her from time to time to procure means to prosecute said work; that said railroad company had no means whatever for the payment of said amounts so borrowed, and unless this respondant would provide means for the payment of said amounts, the whole amount of the bonds so issued by this respondant would be sold for the payment thereof, and, owing to the doubt thus cast upon their validity, would not sell for more than would be sufficient to pay the sums so borrowed. Said railroad company therefor proposed to this respondant that if the latter would provide means to pay said amount so borrowed, and redeem said bonds from the persons with whom they were pledged, said bonds should be returned to this respondant to be cancelled.

This respondant believing said representation to be true, and that there was no probability that said railroad company would ever be able to resume operations upon its said railroad, or even complete any portion of the same, did, by its ordinance of her common council, passed on
46 the day last aforesaid, and duly published immediately thereafter, accept said proposition of said railroad company, upon the condition that the latter would cancel the said subscription of stock made by this respondant, and consent to the repeal of all ordinances and amendments thereto in relation to said subscription. This condition was duly accepted by said railroad company, and said agreement was thereupon carried into effect on the day and date aforesaid. This respondant paid said sums so borrowed by said railroad company, and for which said bonds were pledged, amounting to more than thirty-six thousand dollars, ($36,000.) Said bonds so issued by this respondant, except seven, which had been sold, were returned to this respondant and cancelled, and said subscription of stock made by this respondant was cancelled, and since that date this respondant has not held or owned any stock whatever of said railroad company, nor has she owed, nor does she now owe, any sum whatever to said railroad company. At the time said agreement last mentioned was made, and said subscrip-
47 tion of stock cancelled, said railroad company represented to this respondent that, by the payment of said sums necessary to redeem said bonds, all the debts and liabilities of said railroad company would be extinguished. This respondant believed said representation to be true, and the respondant now avers they were true, and that said rail-

road company had no other liabilities, and owed no other debts whatever, unless said railroad company shall still remain liable for same amounts upon the real estate bonds hereafter mentioned. Said agreement was made by this respondant in the utmost good faith, without any interest to hinder or defraud the creditors of said railroad company in the collection of their debts, and for the sole purpose of preventing the large amount of her corporate bonds so issued [so issued] to said railroad company from being sold for the payment of the debts for which they were pledged as aforesaid. Said suits contesting the validity of said bonds were then still pending in said Floyd circuit court, and there was no possibility of having a determination thereof before said debts, for which they were pledged, were required to be paid. And this
48 respondant believes and avers that but for said agreement, and the payment of said debts by her, said bonds would have been sold, and that, under the doubt thus cast upon their validity, said railroad company could not have realized from such sale enough or more than enough money to pay the debts for which they were pledged.

And this respondant further avers that the complainants, in their bill of complaint in this suit mentioned, did not, nor did either of them, nor did any person or persons, do any act or thing to contest the validity of said agreement so made with said railroad company and the cancellation of said subscription of stock, or institute any suit or proceedings to have the same set aside as fraudulent and void as against these or any other creditors of said railroad company until more than ten years after said agreement was made and carried into effect; nor was any such suit or proceedings ever instituted, or the validity of said agreement called in question until the bill of complaint was filed in this suit, more than ten years after said agreement was consummated, although they well knew of said agreement and cancellation at the time thereof.

49 And this respondant, further answering, says that, on the 20th of September, 1854, said railroad company, being the owners of a large quantity of real estate received in payment of stocks subscribed, conveyed a portion of the same by a deed of that date to the said William S. Pierson, jun., and Harvey Seymour for the uses and upon the trusts therein specified. Said deed recites that said railroad company, being the owner in fee-simple of said real estate, had resolved to raise a sum of money not exceeding one hundred and ten thousand dollars in amount, upon a mortgage of said property to the said Pearson and Seymour, to aid in the construction of its railroad, and for that purpose to execute one hundred and ten bonds for one thousand dollars each, to be negotiable in the city of New York, and made payable on the 1st day of January, 1865, bearing an interest payable semi-annually in the city of New York, without relief from valuation or appraisement laws, and containing a clause permitting the holder thereof to exchange the same at par for shares of stock in said railroad company at any time within five years from the date thereof; and that, therefore, to secure the pay-
50 ment of said bonds and interest, the said railroad company conveyed to the said Pearson and Seymour, and their successors in the trust thereby created, all of said property therein specified, approved by Victor A. Pepin, Samuel H. Owen, and Augustus Bradley to be of the value of one hundred and fifty-four thousand eight hundred and fifty-five dollars, ($154,855,) and more particularly specified and enumerated and described in a schedule of the same, certified by said appraisers to be of the value aforesaid, thereto annexed and made a part of said deed. By the terms of said deed said Pearson and Seymour were to have and hold said property upon the trusts that if said railroad company should

fail to pay the principal or any part of it, or any part of the interests upon the same, when the same should become due, when demanded, then, after sixty days from such default, upon request of the holder of such bond, said trustees should enter and take possession of all or any part of said property, and apply the rents and profits thereof to the payment of the principal and interest of all such bonds remaining unpaid, or upon said trustees might, at their discretion, and upon the
51 written request of the holders of at least one-half of said bonds, should cause said property to be sold at public auction in the manner therein specified, and apply the proceeds of such sale to the payment of said bonds and interest, and the necessary expenses. By a supplemental agreement, made a part of said deed, it was provided that if said railroad company should at any time be in default in the payment of the interest due on any of said bonds, then the principal of all of said bonds should become due and payable from the time of such default, and any suit or action at law or equity might be commenced against said railroad company to recover said principal and interest, and after sixty days from such default said Pearson and Seymour, as such trustees, should take possession of all said property, and at their discretion use or sell the same for the payment of any part of said bonds and the interest thereon.

This respondant is informed and believes it to be true that said Pearson and Seymour accepted the trust specified in said deed, and that said railroad company made and issued one hundred and ten bonds for one thousand dollars ($1,000) each, of the character and descrip-
52 tion therein mentioned.

This respondant is also informed, and believes it to be true, that one Victor A. Pepin did bring a suit upon certain of said bonds described in said deed against said railroad company and others, in the Floyd circuit court, at its October term, 1857, as charged in said bill of complaint; said Pearson and Seymour, as such trustees, were made parties to said suit, and, having been informed that fifty-three of the bonds specified in said deed of trust were outstanding in the hands of the said John Phelps Putnam, Sarah Coit Day, Samuel J. Andrews, Catherin D. Andrews, Rollin C. Dewitt, Elijah Dewitt, George R. Starr, Horace C. Starr, Heman Ely, C. Arther Ely, and Augustus H. Moss, none of whom were parties to said suit, in discharge of their duty as such trustees, and to secure to said persons their equitable rights to the property specified in said deed of trust, filed an answer in said suit, averring that said fifty-three bonds were outstanding in the hands of said persons and praying that said mortgaged property should be sold for the payment of the same.

This respondant also admits it to be true that, on the 14th of
53 November, 1857, a judgment was rendered by said court for the foreclosure and sale of said mortgaged property for the payment of the bonds claimed by the plaintiff and cross-complainants in said suit, and in favor of the said Pearson and Seymour, in trust for the payment of those alleged by them to be outstanding in the hands of the persons aforesaid; but this respondant denies that, in the order made by said court for the sale of said mortgaged premises, there were any directions that the ballance due on the mortgage debt and costs of suit which might remain unsatisfied after the sale of the mortgaged premises should be levied of any other property of said railroad company. No such direction was requested of said court by said Pearson and Seymour as such trustees, nor were they, nor have they ever been, trustees for the persons aforesaid for any other trust or purpose but to hold the

mortgaged premises aforesaid for the purposes specified in said deed of trust hereinbefore mentioned. They had no authority to sue for the persons named in the answer filed by them in said suit, and said answer was filed for the sole purpose of securing to them their due proportion of the proceeds of said mortgaged property when the same
54 should be sold for the payment of the lands thereby secured.

Respondant says that the said supposed award of execution in favor of said complainants for the said supposed amount remaining unsatisfied after the sale of the mortgaged premises was made at a term of said Floyd circuit court subsequent to the term at which final judgment in said cause was rendered; that said railroad company was not then present in court, nor had been summoned or notified to appear, and was not subject to the jurisdiction of the court in that behalf; wherefore respondant says there is no record of the said supposed award of execution in the complaint mentioned.

This respondant further says that, after said judgment was rendered, said persons named in said answer of said trustees assumed the direction and control of the judgment so rendered in trust for their use and pursuant to an agreement made by them and the other parties to said suit, in whos favor judgment was rendered on bonds of the same description held by them. Nearly all of the property described in said mortgage or deed of trust was bid off by Victor A. Pepin and
55 Michael C. Kerr at the sale of the same, made pursuant to said judgment; and said property was conveyed to said Pepin and Kerr to be held by them in trust for the use of said several parties in whos favor said judgment was rendered. Said railroad was also the owner of a large quantity of other real estate not included in said mortgage or deed of trust which had been mortgaged to certain other of the parties in whose favor said judgment was rendered as additional security for the bonds held by them. At a subsequenty sale of the property included in said last-mentioned mortgage, by the agreement of parties in whos favor the same had been made, and the consent of said railroad company, the same was bid off at a nominal price by said Heman Ely, in order that all the property included in both mortgages should be thrown into a general fund for the payment of all the bonds secured by said mortgage first mentioned. Said Ely bid off said last-mentioned property for the benefit of all said several parties holding said bonds, and paid nothing therefor.

All of said property, as well that included in said deed of trust
56 to said Pearson and Seymour as that included in said second mortgage, being thus vested in the parties originally holding the bonds so secured by said deed of trust, afterwards a voluntary agreement for a partition was made by said several parties, each agreeing to receive the portion or share allotted to him at a stipulated price or value. In said partition said persons for whom said judgment was rendered in favor of said Pearson and Seymour in trust as aforesaid, and who are now represented by the complainants in this suit, recovered a larger portion of said property, kaking the same for the aggregate sum of twenty-five thousand six hundred and ninety-eight dollars, ($25,698,) a large portion of which was property not covered by the deed of trust to said Pearson and Seymour, but being other properties of said railroad company bought as aforesaid, to be thrown into the general fund, which last-mentioned property was taken by them at the price of ten thousand dollars, ($10,000.) And afterwards, at the November term of the Floyd circuit court, in 1858, on the petition of said parties, a decree was rendered by said court partitioning all of said property to said sev-

eral parties according to the terms of said voluntary agreement
57 for a partition, since which time the complainants in the bill of complaint in this suit mentioned, or those they represent, have been in possession of all said property so partitioned to them, and still hold and possess the same under the title thus required.

And this respondant further shows that afterwards, to wit, on the 19th day of February, in the year 1863, one William Lindly filed in said Floyd circuit court of the State of Indiana his complaint against said John P. Putnam, Samuel J. Anderson, Sarah C. Day, Elijah Dewitt, Rollin C. Dewitt, George R. Starr, Horace C. Starr, Heman Ely, Charles Arther Ely, and Augustus H. Moss, (being the same persons respectively who are the complainants in this suit, and the assignors of said Stevenson Burke and Heman Ely,) and said New Albany and Sandusky City Junction Railroad Company and others; said complaint was filed by said plaintiff "for himself and for all others holding bonds similar in character to the three held by him of the 110 hereinafter named."

Said William Lindley, in his said complaint, averred, among other things, that he was the owner of three of said real estate bonds
58 secured by said mortgage or deed of trust to said Pearson and Seymour in the bill of complaint herein mentioned, and duly filed with his said complaint copies of said bonds and of said mortgage or deed of trust, and prayed for judgment upon said bonds, and foreclosure and sale of said mortgage premises to satisfy the same; and in his said complaint said Lindley further averred generally that all the defendants therein named, other than said railroad company and said Pearson and Seymour, trustees, (who were also made defendants,) claimed some interest in the subject of said action; wherefore they were made parties, and required to answer thereto.

Respondant says that said Floyd circuit court then [then] had full and complete jurisdiction of the subject-matter of said suit; and that subsequently, and before trial or final judgment in said cause, said court obtained and had full jurisdiction of the persons defendants therein, in respect of said cause, by its process duly issued and served, and by the personal appearance of all said defendants to said action.

59 And afterwards, to wit, at the May term, 1864, of said Floyd circuit court, said John T. Putnam, Samuel T. Anderson, Sarah C. Day, Elijah Dewitt, Rollin C. Dewitt, George R. Starr, Horace C. Starr, Heman Ely, Charles Arther Ely, and Augustus H. Mass, (together with another defendant,) appeared and filed their just answer and cross-complaint in said cause against said plaintiff Lindley and their co defendants, including said railroad company, in which answer and cross-complaint, among other things, they averred and set up said former judgment of foreclosure of said mortgage and sale of said mortgage premises, being the same mentioned in the bill of complaint herein, and averred that the proceeds of said sale of the mortgage premises were wholly insufficient to pay their said claims and demands, (being the identical claims and demands in the bill of complaint herein mentioned,) and that they have never received ofrom said railroad company in payment, on account of said former judgment of foreclosure, (being the same mentioned in the bill of complaint herein,) anything except certain lands therein mentioned set off to them as their proportion of the lands
60 purchased at said sale under said former judgment of foreclosure, and that the balance of said former judgment in their favor respectively, as shown by the report of the commissioner appointed by

the court in and by said former judgment of foreclosure to make sale of said mortgage premises, remained wholly unpaid.

And upon said answer and cross-complaint, and each allegation thereof, afterwards, in said Floyd circuit court, issue was taken and joined by said plaintiff William Lindley and by said New Albany and Sandusky City Junction Railroad Company.

And afterwards, at a special term of said Floyd circuit court, to wit, on the 18th day of February, 1868, each of the complainants herein appeared in said cause, in said Floyd circuit court, and filed his further answer therein, the said Heman Ely, in his individual character as mortgage creditor and assignee of the interest of said George R. Starr and Horace C. Starr, as in the complaint mentioned, and also in his representative capacity as executor of said C. Arther Ely, then deceased; and the said Stevenson Burke appearing and answering as assignee of
61 said several interests of said Sarah C. Day, Samuel J. Andrews, and Catharine D. Andrews, his wife, Elijah Dewitt, Rollin C. Dewitt, and Augustus H. Mass, as in the complained claimed; by which said last-mentioned answers said complainants herein respectively averred that they were the owners of certain of said real estate bonds, being the identical bonds that had theretofore belonged to them and to those under whom they respectively claimed as aforesaid, and being the identical bonds upon which said former judgment of foreclosure had been rendered in their favor, or in favour of those under whom they respectively claim as aforesaid, and being the identical bonds upon which alone the said supposed judgment and indebtedness in favour of complainants respectively as in said bill of complaint mentioned is founded; and in and by their said answers in said cause these complainants, John Phelps Putnam, Heman Ely, and Stevenson Burke, (said Heman Ely also answering as executor as aforesaid,) respectively joined in the said complaint of said plaintiff William Lindley, and prayed the same relief asked for by him in said cause.

Respondent shows that said cause in said Floyd circuit court
62 was still pending for trial and judgment at the time of the filing of the bill of complaint herein, and at the time when this suit was commenced by said complainants.

And respondant says that afterwards, at said last-named term of said Floyd circuit court, to wit, on the 19th day of February, in the year 1868, the issues in said cause in said Floyd circuit court being duly made and joined by the parties thereto, and the question as to the payment and satisfaction of the ballance due on said judgment and said bonds being at issue, and being tried, said cause was submitted to the court for trial and judgment. And upon said trial, after hearing the evidence adduced, said court, among other things, found that, by the agreement of the parties, the said former judgment of foreclosure, (comprising among others the complainants and those whom they represent as aforesaid,) who were then the holders of said bonds, and the said railroad company, the said mortgage premises were received by them in full payment, satisfaction, and extinguishment of all claims and demands against
63 said railroad company, or any other person, upon said bonds and mortgage, and in full payment, satisfaction, and extinguishment of the said judgment of foreclosure so rendered thereon as aforesaid; and as to said complainants in this suit, and as to all the other parties to said suit in said Floyd circuit court, except said plaintiff therein, William Lindley, claiming to be the holders and owners of any of the bonds described in said mortgage, and seeking judgment thereon, said court found in favor of the defendants to their respective claims or com-

plaints therein, and that said claimants, and each of them, had no equities whatever in their said claims, and were not entitled to any relief in said action. And thereupon it was, by said Floyd circuit court, finally ordered, adjudged, and decreed in said cause, among other things, that the said John P. Putnam, Heman Ely, Stevenson Burke, Heman Ely, executre of the last will of C. Arther Ely, deceased, as well as other defendants in said judgment and decree mentioned, who had also claimed to be the holders of certain of said bonds, and had in like manner prayed relief in said cause, should take nothing by their suits therein;
64 and that, as to each of their claims or complaints therein, the defendants thereto should go hence thereof without day.

And this respondant avers that said final judgment of said Floyd circuit court remains unreversed and in full force. And this defendant says that no material matter in said bill of complaint contained, not herein sufficiently answered, confessed, traversed, and avoided, is true to the knowledge and belief of this defendant.

All which matters and things in this answer contained this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct.

And said defendant humbly prays to be hence dismissed, with her reasonable costs and charges in this behalf wrongfully sustained.

THOMAS L. SMITH,
GEORGE V. HOWK, and
HENDRICKS, HORD AND HENDRICKS,
Sol's for Defendant.

And here follows the answer of the New Albany and Sandusky City Junction Railroad Company:

The answer of the New Albany and Sandusky City Junction Railroad Company to the bill of complaint filed against her and others
65 by John Phelps Putnam and others in said circuit court of the United States.

This defendant by protestation, nor confessing all or any of the matters and things in said complainants' bill of complaint contained to be true in manner and form as the same are therein set forth and alleged, but specifically denying the same, except so far as the same are hereinafter admitted and stated to be true, for answer to the matters and things stated in said bill of complaint, or so much thereof as she is advised it is necessary and proper she should answer unto, she answering says:

This respondant admits it to be true that, at the October term of the Floyd circuit court in 1857, a suit was instituted in said court by Victor A. Pepin against this respondant and others to recover the amount due upon certain bonds issued by this respondant, known as real estate bonds, and that a judgment was rendered in said suit for the foreclosure and sale of certain real estate mortgaged by this respondant by a deed of trust to William S. Pearson and Harvey Seymour to secure the payment of said bonds; but this respondant denies that, in judg-
66 ment aforesaid, as in the order made by said court for the sale of said mortgaged premises, there was any order or direction that the balance due on the mortgaged debt and costs of suit which might remain unsatisfied, after the sale of the mortgaged premises, should be levied of any other property of this respondants; and she denies that any valid execution ever issued on said judgment after the sale of said mortgaged premises, made pursuant to said judgment.

And this respondant further says that, at the sale of said mortgaged premises, nearly all of the same was, pursuant to an understanding of the parties, bid off for the benefit of the several parties who had obtained said judgment for the foreclosure of said mortgage.

And this respondant admits that at said sale said mortgaged property, at the price it was struck off, did not sell for a sufficient amount to pay the amount adjudged to be due the several holders of said bonds who had obtained said judgment thereon. But this respondant was also the owner of a large quantity of other real estate not included in said mortgage or deed of trust, which had been mortgaged to certain other parties, in whos favor said judgment was rendered as an
67 additional security for the lands held by them, but upon which the complainants in the bill of complaint in this suit mentioned, or those they represent, had no interest or claim whatever. At a subsequent sale of the property mentioned in said last-mentioned mortgage, pursuant to an agreement of all the parties that all of said property so included in both mortgages should be appropriated to the benefit of all the holders of said 110 bonds, and that they should receive and hold the same as full payment of said bonds and of their said judgment thereon, said property was permitted to be bid off for the benefit of all the holders of said bonds for a nominal sum, and without the payment of any money, which was done, by which means the holders of said bonds acquired title to all the property included in both mortgages, and afterwards had the same partitioned among themselves; the complainants in the bill of complaint mentioned thus receiving a large quantity of valuable real estate of the value of at least ten thousand dollars, ($10,000,) to which they would otherwise have had no claim whatever.

And this respondant further says that afterwards, in the year 1863, one William Lindley commenced another suit in the Floyd circuit
68 court upon some of the said bonds secured by said deed of trust to said Pearson and Seymour, on behalf of himself and the other holders of said bonds against this respondant and others, in which suit the complainants in the bill of complaint in this suit mentioned were made parties, and, joining with the plaintiff, they demanded judgment on the same identical bonds upon which said judgment had been rendered in said former suit in favor of said Pearson and Seymour in trust for their benefit, and alleged to have been owned by them in their bill of complaint filed in this suit. Issues were joined in said suit commenced by said Lindley upon the complaint filed by him and the complainants in this suit, and the answers of this respondant and others, and said suit was still pending for trial at the time when the bill of complaint was filed, and when this suit was commenced by the complainants, and involved the question of their right of a further satisfaction of said bonds or of the judgment rendered thereon in 1857 as aforesaid. And afterwards, to wit, on the 19th day of February, 1868, said suit commenced by said Lindley, being then still pending, a finding and judgment was therein found and rendered by said circuit
69 court. As the result of said trial in said circuit court, said court found that the complainants in the bill of complainant in this suit mentioned, as well as all the other parties originally holding said bonds, had received said property of said railroad company hereinbefore mentioned in full satisfaction and payment of all their claims and demands against this respondant arising out of or upon said bonds in any way whatever; and, therefore, said court rendered judgment in favor of this respondant, and ordered all of said bonds to be filed in said court, and

cancelled as fully paid and discharged; which was done. And this respondant avers that said judgment still remains in full force.

And this respondant, further answering, says that, in reference to the judgment of foreclosure in the Floyd circuit court rendered in 1857, in the plaintiff's bill of complaint mentioned, and in reference to the subscription of stock by said city of New Albany, the issuing of bonds by said city in payment therefor, and the return thereof, and the cancellation of said subscription pursuant to a compromise made by this respondant with said city for the purpose of procuring payment of the debts contracted by this respondant, and for which said bonds had been
70 pledged, and all subsequent proceedings relating thereto, and in reference to the execution and delivery of said deed of trust to said Pearson and Seymour, and of the trust therein conferred, and their proceedings under said trust, this respondant adopts the answer of their co-defendant, the City of New Albany, and avers that each and all the matters and things therein stated are true, as fully and effectually as if the same were herein again stated and set forth.

And this respondant further avers that the complainants in the bill of complaint in this suit mentioned did not, nor did either of them, nor did any person under whom they claim, or any other person, do any act or thing to contest the validity of said agreement so made by this respondant with the co-defendant, the said City of New Albany, for the cancellation of her subscription for stock, or such cancellation, or institute any proceedings to have the same set aside as fraudulent and void as against them or any other creditors of this respondant, until more than ten years after said agreement was made or carried into effect; nor was any such suit or proceeding instituted, or the validity of said agreement or cancellation called in question, until the bill of com-
71 plaint was filed in this suit, more than ten years after said agreement was consumated.

All which matters and things this defendant is ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf wrongfully sustained.

THOMAS L. SMITH,
GEORGE V. HOWK, and
HENDRICKS, HORD AND HENDRICKS,
Solictors for Def't.

And here followes the answer of Thomas L. Smith and twenty-seven others, defendants in said cause:

The answer of Thomas L. Smith, Michael C. Kerr, John S. McDonald, John S. Davis, Horatio N. Duval, Thomas Danforth, William S. Culbertson, John B. Crawford, Ephriam S. Whistler, William Lockmiller, Bela C. Kent, Alexander Kent, John A. McMahan, Laurence Bradly, James Montgomery, Samuel Montgomery, Walter Mann, George V. Howk, Bradford E. Scribner, John B. Winstandly, Jesse Brown and John B. Winstandly, executors of John Brown, deceased, Augustus Bradley, Jesse J. Brown, Benjamin F. Scribner, Isaac P. Smith, and John F. Anderson, to the bill of complaint filed against them
72 and others by John Phelps Putnam and others in said circuit court of the United States for the district of Indiana.

These defendants by protestation, not confessing all or any of the matters and things in the said complainants' bill of complaint contained to be true in manner and form as the same are therein set forth and alleged, but specifically denying the same, except so far as the same are

hereinafter stated to be true, for answer to the matters and things stated in said bill of complaint, or so much thereof as they are advised it is necessary and proper they should answer unto, they answering say:

That these defendants did, each of them, with other persons who have not been made parties to this suit, whos names will be hereafter mentioned, on the 22d of August, 1853, subscribed for stock in the New Albany and Sandusky City Junction Railroad Company in various amounts, each subscription, however, being for more than three hundred dollars of said stock, which subscriptions were made at the time of the organization of said railroad company, but before it became incorporated under the general laws of the State of Indiana as to the incorporation of railroad companies, but with a view to become
73 so incorporated under said general laws, by subscriptions for such stock to articles of association for the purpose of forming such a corporation.

Said articles of association were to the effect that the subscribers thereto agreed to form a railroad company under the laws of the State of Indiana provides for the incorporation of railroad companies, to construct a railroad running between certain places therein named, and for that purpose to subscribe and pay for the amount of stock set opposite their respective names. It was provided, however, in said articles of association so subscribed by these defendants, that if the city of New Albany, in its corporate capacity, should thereafter take stock in said corporation to the amount of fifty thousand dollars or upwards, inasmuch as the defendants and present subscribers thereto were residents of, and owning property in, said city, and would then be under the necessity of contributing still further to the objects of the corporation by way of taxation, unless a portion of their present subscription should be taken off their hands, the said city should accept, in part of the amount to be subscribed in its corporate capacity at its par value, a
74 transfer of any amount of the stock subscribed to said articles of association by these respondants and the other subscribers thereto over and above the amount of six shares or three hundred dollars, which each such individual subscriber should desire or request should be so transferred. A copy of said articles of association and subscriptions thereto is filed herewith, marked Exhibit "A." And these respondants and that city of New Albany did afterwards, on the 18th of November, 1853, in its corporate capacity, subscribe for 8,000 shares, amounting to four hundred thousand dollars of the capital stock of said railroad company, which had then become a corporation duly organized under the laws of said State of Indiana; and that afterwards, on 31st of December, 1853, an order was duly made by the board of directors of said railroad company to the effect that the original subscribers to the articles of association of said company be permitted, in accordance with the stipulations therein contained, to transfer any amount of the stock so originally subscribed by them, over and above the amount of six shares or three hundred dollars to the said city of New Albany,
75 said city having made a subscription to the stock of said company to the amount of fifty thousand dollars and upwards, and that the stock thus transferred should be merged in the subscription so made by said city, so that the stock of said city under her then subscription with the stock so transferred should not exceed four hundred thousand dollars so subscribed by her. A copy of the said order as the same remains of record among the records of said company is herewith filed, marked Exhibit "B."

And these defendants further say they did, immediately after the making of said order by said board of directors, transfer on the books

of said railroad company all of said stock so originally subscribed by each of them to said city of New Albany, and the same was merged in the said stock so subscribed by said city except six shares, or three hundred dollars ($300) of said stock, which was retained by each of said subscribers. After said transfer was so made, these respondants did not, nor did either of them, ever claim more than three hundred dollars of said original stock so subscribed by them, nor did said railroad company, upon its books or otherwise, ever claim or demand of them,
76 or either of them, payment of such subscription of stock over and above said amount of three hundred dollars so subscribed by each of them, which amount they and each of them fully paid; and they are not now, nor is either of them, indebted to said railroad company in any amount whatever.

And these respondants further say that said transfer of said portions of their said stock so originally subscribed by them to said city of New Albany was made before said railroad company had made any contract for work to be done upon its said railroad, or had issued any bonds or obligations whatever, and long before the bonds mentioned in the bill of complaint of the plaintiffs herein were made and issued; and that the stock so merged in the stock so subscribed by the city of New Albany was well known to said city, who acquiesed therein, and that said city was informed, before and at the time said subscription made by her, that there was such a provision in the articles of association of said railroad company as is before stated, and that the subscribers thereto intended to avail themselves thereof to transfer such portions of their stock to her.

And these respondants further say that no price or consideration
77 whatever was paid or promised to them, or either of them, by said city for the stock so transferred, but that, by mutual understanding and agreement between these respondants, said railroad company and said city, and in accordance with said proviso in their said subscription, their said excess of stock over six shares each was made over to said city as aforesaid as and for so much of said 8,000 shares of stock so subscribed by said city, and that the price thereof was embraced in and formed part of said four hundred thousand dollars ($400,000) assumed and promised by said city as aforesaid; and that said railroad company accepted said subscription and contract of said city as in full satisfaction and discharge of all liability of their respondants, or any of them, upon their said conditional subscriptions to the extent of the price of the stock so made over to the city by them. They say that said stock so made over by them to said city formed, in fact, part of the identical stock so sold by said railroad company to said city, and that the same was by these respondants made over directly to the city for mu-
78 tual convenience and to avoid the more troublesome process of surrendering, cancelling, and reissuing the same.

And respondants say that, from that time until the time of the commencement of this suit, more than fourteen years elapsed, during all of which time it was never claimed or pretended by said railroad company, or by these complainants, or by any other person, that these respondants, or either of them, were subject to any pecuniary liability whatever in respect of said stock so made over to said city, or in any manner whatever, upon their said subscription.

And these respondants, further answering, say that, besides these respondants and others who are made parties to this suit, the following-named persons, who are not made parties to this suit, subscribed for stock in said railroad company by subscribing said articles of associ-

ation and agreeing to pay for the amount of stock set opposite their respective names, at the same time, in the same manner, and upon the same conditions as these respondants did, to wit: Horatio Deval, and
Fordyce, under their firm name of Deval and Fordyce, James C.
79 Moody, Jefferson Conner, Nathaniel Moore, Phineas M. Kent,
William B. Lent, Benjamin South, and William C. Shipman, under their firm name of Lent, South and Shipman, John Evans, and John Brown, each subscribed five thousand dollars, ($5,000;) William S. Hillyer, Victor A. Pepin, and P. M. Willcox, each subscribed two thousand five hundred dollars, ($2,500;) Joseph A. Moffiit, and Charles Van Duzen, each subscribed two thousand, ($2,000;) Thomas Jack, John Loughmiller, Christian Telaru, John Box, Horace B. Wilson, Henry Lake, George H. Ashtree, James Pierce, Milton Gregg, John M. Rawlins, Horatio N. Devol, John W. Childs, each subscribed one thousand dollars, ($1,000;) and William B. Plummer, and John Bushnell, under their firm name of Plummer and Bushnell, subscribed five thousand dollars, ($5,000.)

These respondants are informed, and believe it to be true, that each of said subscribes last named, in accordance with said proviso in said articles of associations to that effect, did, in the same manner as these respondants, transfer, each of them, all the stock so subscribed by them, except the amount of three hundred dollars or six shares retained by
each of them, to said city of New Albany, and never paid for or
80 claimed any of the stock so transfered. Many, if not all, of said
subscribers are solvent, and residents of the State of Indiana.

And these respondants further say that said railroad company is now, and has ever been since said judgment was rendered in 1857 in favor of the persons named in the complainants' bill of complaint, insolvent, and possessed of no property, real or personal, but owes no debt of any kind or to any person, unless it should be held by the court that said company is still indebted for a ballance remaining unpaid upon the said bonds mentioned in the complainants' bill of complaint, and claimed by the complainants to be unpaid in full.

And these respondants, further answering, say that, in reference to the judgment of foreclosure in the Floyd circuit court in 1857, mentioned in the complainants' bill of complaint, and all the proceedings and acts of the parties subsequent thereto, they are informed and believe that the matters stated in the answers of their co-defendant, the City of New
Albany, are true, and they adopt said answer in so far as it relates
81 to the same, and aver that each and all the matters and things,
in manner and form as therein stated, are true, as fully and effectually as if the same were herein again stated and set forth.

And, further answering, they say that, as to the said suit of the said William Lindly in said Floyd circuit court, and the proceedings had and final judgment rendered therein, the same are truly stated in the said answer of their co-defendant, the City of New Albany, and they adopt said answer in so far as it relates to said proceedings and final judgment, and aver that the same is true, and that by force of said judgment said complainants, and each of them, are fully and forever barred of their supposed claims in said bill of complaint mentioned.

All of which matters and things these defendants are ready to aver, maintain, and prove, as this honorable court shall direct.

And they humbly pray to be hence dismissed with their reasonable costs in this behalf wrongfully sustained.

T. L. SMITH,
GEORGE V. HOWKS,
HENDRICKS, HORD AND HENDRICKS,
Solicitors for Def'ts.

82 EXHIBIT "A."

Articles of association of the New Albany and Sandusky City Junction Railroad Company.

The undersigned subscribers agree to form a railroad company under the laws of the State of Indiana providing for the incorporation of railroad companies, to construct a railroad from the city of New Albany, in said State, to form a junction with the railroad of the Fort Wayne and Southern Railroad Company, and also with the railroad leading from Sandusky City by or near Eaton, in the State of Ohio, to the line dividing the States of Indiana and Ohio, and for that purpose to subscribe and pay for the amount of stock set opposite their respective names.

The corporation to be formed by these articles of association shall be styled The New Albany and Sandusky City Junction Railroad Company. The capital stock of said corporation shall be two millions of dollars, divided into forty thousand shares of fifty dollars each, which capital stock may be increased from time to time if necessary, according to the provisions of the laws of the State providing for the incorporation of railroad companies.

83 The railroad of said corporation shall be constructed on the nearest practicable rout, and in as direct a course as the nature of the country will permit, diverging from a straight line only for the purposes of securing the most favorable location for the road and such local advantages as may be deemed for the interest of the corporation, from said city of New Albany, through the counties of Floyd, Clark, Scott, Jennings or Jefferson, or both, as may be found necessary or expedient, Ripley, Franklin, and Union to the said State line, and will be in length, as nearly as can now be ascertained, about one hundred and ten miles.

The affairs of the corporation shall be managed by a board of directors, consisting of thirteen of the stockholders; and the following persons, namely, John S. Davis, Thomas L. Smith, John S. McDonald, James Montgomery, Phineas M. Kent, John B. Winstandley, James C. Moody, James Brooks, Joseph A. Moffitt, Nathaniel Moore, Jefferson Conner, Victor A. Pepin, and John B. Anderson, shall compose said board until the next annual meeting of the stockholders, which shall be held at such time and place as said board shall fix by the bye-laws to be

84 [to be] hereinafter adopted.

In testimony whereof the undersigned subscribers have hereunto set their signatures, with the number of shares and the amount thereof respectively subscribed by them, and their places of residence, at New Albany, in the State of Indiana, this 22d day of August, 1853.

Provided, however, and it is hereby understood, that if the city of New Albany, in its corporate capacity, shall hereafter take stock in this corporation to the amount of fifty thousand dollars or upwards, inasmuch as the present subscribers, being residents of and owning property in said city, will then be under the necessity of contributing still further to the objects of the corporation by way of taxation, unless a portion of the present subscription is taken off their hands, the said city shall accept in part of the amount to be subscribed in its corporate capacity, at its par value, a transfer of any amount of stock now subscribed for by each individual over and above the amount of six shares or three hundred dollars which each such individual may desire or request shall be so transferred.

85	Names of subscribers.	Place of residence.	No. of shares.	Amount.
	James S. Davis	New Albany.	100	$5,000
	Thomas L. Smith	"	100	5,000
	Brooks & Brown	"	100	5,000
	John S. McDonald	"	100	5,000
	Deval & Fordice	"	50	2,500
	James Montgomery	"	50	2,500
	Samuel Montgomery	"	100	5,000
	William M. Weir	"	100	5,000
	Ezekel R. Day	"	40	2,000
	Silas C. Day	"	50	2,500
	Scribner & Deval	"	100	5,000
	James C. Moody	"	50	2,500
	W. S. Hillyer	"	100	5,000
	Jefferson Conner	"	50	2,500
	Victor A. Pepin	"	50	2,500
	Thomas Danforth	"	40	2,000
	Franklin Warren	"	100	5,000
	Plummer & Bushnell	"	50	2,500
	W. S. Culbertson	"	40	2,000
	John B. Crawford	"	40	2,000
	Walter Mann	"	40	2,000
	A. Clapp	"	40	2,000
	Joseph A. Moffitt	"	100	5,000
	Nat. Moore	"	100	5,000
	P. M. Kent	"	100	5,000
	Lent, South & Shipman	"	50	2,500
	George V. Howk	"	100	5,000
	John Evans	"	60	3,000
86	John B. Anderson	"	20	1,000
	E. S. Whistler	"	20	1,000
	R. E. Scribner	"	20	1,000
	Thomas York	"	20	1,000
	John Loughmiller	"	20	1,000
	James Johnson	"	20	1,000
	Cha's Tilson	"	20	1,000
	John Box	"	20	1,000
	Thomas B. Wilson	"	20	1,000
	Henry Lake	"	30	1,500
	John F. Anderson	"	50	2,500
	P. M. Wilcox	"	40	2,000
	John Knefley	"	20	1,000
	George H. Ashton	"	40	2,000
	Cha's Vandusen	"	20	1,000
	James Pierce	"	20	1,000
	Milton Gregg	"	20	1,000
	J. M. Rawlins	"	20	1,000
	H. N. Deval	"	20	1,000
	J. W. Childs	"	100	5,000
	Kent & Bro's	"	100	5,000
	J. H. Winstandly	"	100	5,000
	John Brown	"	20	1,000
	M. C. Kerr	"	25	1,250
	J. P. Smith	"	20	1,000
	Augustus Bradley	"	50	2,500
	McMahan & Bradley			

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EXHIBIT "B."

SATURDAY EVENING, *December 31st*, 1853.

The board met, pursuant to the adjournment at the last meeting, at the office of the company, at the usual hour. Present, Myers, Davis, Montgomery, Winstandley, Weir, Evans, Moffitt, and Smith.

On motion, it was ordered that the original subscribers to the articles of this company be permitted, in accordance with the stipulations contained in said articles, to transfer any amount of the stock so originally subscribed by them, over and above the amount of six shares or three hundred dollars, to the city of New Albany, said city having made a subscription to the stock of said company to the amount of fifty thousand dollars and upwards; and that the stock thus transferred be merged in the subscription already made by said city, so that the stock of said

city under her present subscription, with the stock so transferred, shall not exceed four hundred thousand dollars, as subscribed by her.

There being no further business, the board adjourned.

JOHN S. DAVIS, *Pres't.*

Attest: THOMAS L. SMITH, *Secretary.*

88 And afterwards, to wit, at the November term of said court, on the 6th day of November, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled were had, to wit:

Come now the complainants, by Mr. Porter, their solicitor, and file their replication in chancery to the answer of the New Albany and Sandusky City Junction Railroad Company as follows, to wit:

The replicon of Heman Ely and others, the complainants, to the answer of the said railroad company, defendant.

The repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by the repliants, and these repliants expressly deny each and singular of the facts, statements, defense, matters, and things in said answer contained, except such
89 statements therein as admit the bill of complaint to be true.

All which these repliants are and will be ready to aver and prove, as this honorable court shall direct, and prays as in and by their said bill they have already prayed.

PORTER, HARRISON AND FISHBACK, and
S. BURKE, *Sol's for Comp'ts.*

And afterwards, to wit, at the November term aforesaid of said court, on the 22d day of December, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

The parties come by their respective counsel, and, upon leave granted, the defendant, the City of New Albany, doth now amend by inserting in her answer the words, "and the question as to the payment and satisfaction of the balance due on said judgment and said bonds being at issue and being tried."

And the plaintiffs now file the general replication in chancery in the words and figures following, to wit:

The replication of Heman Ely and others, the complainants, to
90 the answers of the City of New Albany, Thomas L. Smith, Michael C. Kerr, John S. McDonald, John S. Davis, Horatio N. Deval, Thomas Danforth, William S. Culbertson, John B. Crawford, Ephriam S. Whistler, William Lockmiller, Bela C. Kent, Alexander Kent, John H. McMahan, Laurence Bradley, James Montgomery, Samuel Montgomery, Walter Mann, George V. Howk, Bradford E. Scribner, John B. Winstandley, Jesse Brown and John B. Windstanly, executors of John Brown, deceased, Augustus Bradley, Jesse J. Brown, Benjamin F. Scribner, Isaac P. Smith, and John F. Anderson.

These repliants, saving and reserving to themselves all and all man-

ner of advantages of exception to the manifold insufficiencies of the said answers, for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answers of said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants, and these repliants expressly deny each and singular of the facts, statements, defense, matters, and things in said answer contained, except such
91 statements therein as admitted the bill of complaint to be true: all which these repliants are and will be ready to aver and prove, as this honorable court shall direct, and prays as in and by their said bill of complaint they have already prayed.

PORTER, HARRISON AND FISHBACK, and
S. BURKE, *Sol. for Compl'ts.*

And the parties, by their said solicitors, do now agree of record that all the depositions to be taken and read in this cause shall be taken in all respects in conformity with the practice prevailing in the courts of the State of Indiana.

And this cause is continued.

And afterwards, to wit, at the May term of said court, on the 2d day of June, A. D. 1869, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Now again come the parties by counsel, and thereupon, upon leave of the court, the appearance heretofore entered and the answers heretofore filed on behalf of William Lockmiller, one of the defendants to said bill of complaint, are withdrawn.

92 And afterwards, to wit, at the May term aforesaid of said court, on the 1st day of July, A. D. 1869, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

This day come the parties by their respective solicitors, and upon motion of the complainants, Silas C. Day, one of said defendants, is three times called and comes not, but makes default; and it is thereupon shown to the court that said Silas has been duly served with the process of subpœna in chancery more than twenty days prior to the first day of the present term of this court, as appears by the marshal's return in the cause. And the cause, being now called for trial, is submitted upon bill and exhibits, answers and exhibits thereto, replications in chancery, the default aforesaid, and the depositions and other evidence. And argument having been heard, and the court, having been advised, doth now find the equity of the cause to be with the complainants as against the defendants, the New Albany and Sandusky City Junction Railroad Company, the City of New Albany, Silas C. Day, and Ezekiel R. Day. And the court doth further find, as to the other
93 defendants to said bill, the equity of the cause to be with them, the said defendants. And thereupon the court refers this cause to J. D. Howland, master in chancery, who is instructed to report with all reasonable diligence, first, what amount is due to the several complainants from said railroad company upon the several judgments in their favor, described in the bill of complaint, including interest to the date of report; second, what amount is due from said defendant Silas C. Day and Ezekiel R. Day upon their respective subscriptions of stock to said railroad company, including interest to date of report.

&c.

And thereupon comes John D. Howland, master as aforesaid, and files his report in this case, which is in the words and figures following, to wit:

The master, to whom this cause is referred with directions to ascertain and report the amounts due to the several complainants upon the judgment against said railroad company in the circuit court of Floyd county, and also the amounts due from stock subscriptions to the same company from the defendants Silas Day and Ezekiel R. Day, now respect-
94 fully reports that, upon said judgment, including interest to date, there is due to Stevenson Burke twenty-seven thousand eight hundred and eighty-two dollars, ($27,882;) to Heman Ely, as the executor of Charles Arther Ely, eighteen thousand five hundred and twenty-two dollars, ($18,522;) to Heman Ely, fifteen thousand eight hundred and seventy-five dollars, ($15,875;) to John Phelps Putnam, seven thousand nine hundred and thirty-seven dollars ($7,937)—making in all seventy thousand one hundred and sixteen dollars, ($70,116.) And he further reports that the said parties named still owe to said railroad company on their stock subscriptions, with interest computed to this date, as follows: Ezekiel R. Day, six thousand two hundred and thirty dollars, ($6,230;) Silas C. Day, three thousand and twenty-six dollars, ($3,026.)

Respectfully submitted.

Decree.

And thereupon this cause came on to be further heard, and the court, being fully advised in the premises, doth order and adjudge that, as to all of said defendants except said New Albany and Sandusky City Junction Railroad Company, the city of New Albany, Silas C. Day, and Ezekiel R. Day, said bill be dismissed at the costs of the complainants.
95 And the court further finds that there is due to the said Stevenson Burke upon the judgment described in the bill and owned by him the sum of twenty-seven thousand eight hundred and eighty-two dollars, ($27,882;) and that there is due to said Heman Ely, as the executor of the estate of said Charles Arther Ely, deceased, the sum of eighteen thousand five hundred and twenty-two dollars, ($18,522;) and that there is due to said Heman Ely personally, upon the judgment held and owned by him and described in said bill, the sum of fifteen thousand eight hundred and seventy five dollars, ($15,875;) and that there is due to said John P. Putnam, upon said judgment owned by him and described in the bill of complaint, the sum of seven thousand nine hundred and thirty-seven dollars, ($7,937;) and that all of said several sums of money should draw interest from the first day of July, A. D. 1869. And the court further finds all the allegations, facts, and statements in the bill of complaint to be true except the allegations of indebtedness of said defendants other than the City of New Albany, Silas C. Day, and Ezekiel R. Day to said railroad company. And, as between the complainants
96 and said railroad company and the city of New Albany, the court finds the issue in favor of the complainants. And the court further finds that there is now due to said railroad company from said city of New Albany the sum of one hundred thousand dollars, ($100,000,) and more, upon its subscription for the stock of said railroad company, bonds, and interest coupons, as alleged in the bill; and that there is due to said railroad company from said Ezekiel R. Day upon his subscription to the stock of said railroad company, as stated in said bill and his answer, for principal and interest, the sum of six thousand two hundred and

thirty dollars, ($6,230;) and that there is due to said railroad company from Silas C. Day the sum of three thousand and twenty-six dollars ($3,026) upon his subscription to the stock of said railroad company, as stated in said bill of complaint; and that enough of said several sums of money so found due to said railroad company to satisfy and discharge said several judgments in favor of the complainants, and the costs of this suit, ought in equity to be so applied.

97 It is, therefore, finally ordered and decreed that the City of New Albany within thirty days pay to the clerk of this court the several amounts found due to the complainants respectively upon said judgments, and also the costs of this suit; and that said defendant Ezekiel R. Day within thirty days pay to the clerk of this court the sum of six thousand two hundred and thirty dollars, ($6,230,) and interest from this date; and that Silas C. Day within thirty days pay to the clerk of this court the sum of three thousand and twenty-six dollars, ($3,026,) and interest from this date; and, in default of the payment of said several sums of money to the clerk of this court by said City of New Albany, Silas C. Day, and Ezekiel R. Day, that execution issue against them severally to collect said several sums so ordered to be paid as upon judgments. It is further ordered that, upon the payment to the clerk of this court by said Ezekiel R. Day and Silas C. Day of the amounts severally found due from them, [that] said sums shall be applied upon the claims of complainants pro rata, and that execution shall issue against said city only for such an amount as may remain unpaid upon said judg-

98 ments and interest thereon, and costs at the time it is issued; and that, upon payment by said city of the amounts so found due to the complainants by said city, either voluntarily under this order or by process of execution, [that] no execution shall issue against said Days, or either of them. And it is further ordered that all moneys paid to the clerk under this order, or made on execution, shall be applied by the clerk pro rata upon the several judgments in the bill mentioned until all are paid; and that, when said judgment and costs of this suit and interests are fully paid, no further money shall be required to be paid by said defendants, or either of them, under this decree.

Appeal and cross-appeal.

And the defendant The City of New Albany now prays an appeal to the Supreme Court of the United States, which is allowed upon the said defendant executing within ninety days a proper appeal bond in the penalty of eighty thousand dollars, ($80,000,) with surety to be approved by the court.

And the complainants now pray an appeal to the Supreme Court of the United States from so much of the final decree herein as dismisses said bill as against all said defendants, except the New Albany

99 and Sandusky City Junction Railroad Company, the City of New Albany, Ezekiel R. Day, and Silas C. Day, and the same is allowed upon the execution of a proper appeal bond, with sufficient surety to be approved by the court, in the penalty of five hundred dollars, ($500.)

And afterwards, to wit, at the term last aforesaid, at the court aforesaid, on the 2d day of August, A. D. 1869, the following further proceedings were had in said cause, to wit:

Comes now the City of New Albany and files her bond for an appeal in this cause, with George V. Howk, Aug. Bradly, H. N. Deval, E. F.

Scribner, L. Bradley, H. B. Webbe, J. B. Ford, Charles Sackett, R. P. Main, Paul Reissing, Louis Hurrle, B. C. Kent, E. S. Whistler, J. H. Faucett, J. B. Norman, G. C. Cannon, C. H. Meeken, Moses Irwin, Louis Vernia, and Washington C. De Pauw, sureties thereon, and the same is approved by the court, and ordered to be filed herein.

And at the same time come John Phelps Putnam, Heman Ely, and Stevenson Burke, and file their bond for an appeal herein. with Albert G. Porter as surety thereon, and the same is approved by the court, and ordered to be filed herein.

100 Here follows the evidence introduced on behalf of complainants:

Pleas before the honorable the judge of the Floyd circuit court within the second judicial circuit of the State of Indiana, continued and held by adjournment at the court-house, in the city of New Albany, on the fourteenth day of November, 1857.

Present, Hon. James Collins, sole judge pro tem.

VICTOR A. PEPIN
v.
NEW ALBANY AND S. C. J. R. R. CO., WILLIAM S. PIERSON, &c.

Be it remembered that heretofore, to wit, on the 22nd day of August, 1857, the plaintiff, by his attorneys, filed in the office of the clerk of the Floyd circuit court his complaint herein; which reads in the words and figures following, to wit:

101 In the Floyd circuit court, October term, 1857.

STATE OF INDIANA, *Floyd County, ss:*

Victor A. Pepin complains of the New Albany and Sandusky City Junction Railroad Company, William S. Pearson, Harvey Seymour, James Montgomery, John S. Davis, William M. Wier, John S. McDonald, Thomas L. Smith, John B. Winstandly, Samuel H. Patterson, Charles Bowman, Charles Howard, and Sebra Howard, defendants, and says that said New Albany and Sandusky City Junction R'road Company executed a mortgage conveying to said defendants Pearson and Seymour, as trustees, as in said mortgage mentioned, sundry tracts of land and lots, in said mortgage described, as security for the payment of one hundred and ten bonds of one thousand dollars each, together with the interest upon the same, at the rate of seven per cent. per annum, payable semi-annually, on July the first and January the first, a duly certified copy of which mortgage is herewith filed, marked "A," and made part of this complaint.

Said plaintiff would further show that he is the owner and holder of seventeen of the bonds in said mortgage specified, and that no part of the July interest upon the same for the present year has been
102 paid, although payment was duly demanded, but the same now remains wholly due, and amounts to the sum of five hundred and ninety-five dollars; which bonds, together with the interest warrants attached, are also herewith filed, marked 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17, and made part of this complaint.

And said plaintiff would further show that by a supplemental pro-

vision of said mortgage it is provided that in case the interest upon said bonds shall not be paid when due, then, in that case, said bonds themselves become due and payable, without any benefit from the valuation or appraisement laws of the State of Indiana.

And said plaintiff further shows said defendants Pearson and Seymour do not reside in the State of Indiana, and have taken no steps whatever to collect said interest or the amount of said bonds or any part thereof, although requested so to do.

And said plaintiff has been informed and believes that said defendants Montgomery, Lent, Davis, Smith, McDonald, Winstandly, Wier, Patterson, Bowman, Charles Howard, and Sebra Howard are each the holders and owners of a part of the bonds in said mortgage specified, amounting in all, together with the bonds held by the plaintiff, to the whole number of bonds issued, to wit, one hundred and ten.

103 Wherefore said plaintiff sues and demands a judgment against said railroad company for twenty-five thousand dollars, the foreclosure of said mortgage, the sale of said mortgaged property, or of so much thereof as may be necessary to pay his said debt, and for all other proper relief in the premises.

VICTOR A. PEPIN,
By OTTO AND DAVIS, *Att'ys.*

In the Floyd circuit court, October term, 1857.

VICTOR A. PEPIN
v.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company, William S. Pearson, Harvey Seymour, James Montgomery, William B. Lent, William M. Wier, John S. McDonald, Thomas L. Smith, John B. Winstandly, John S. Davis, Samuel H. Patterson, Charles Bowman, Charles Howard, and Sebra Howard.

The clerk will issue, &c.

OTTO AND DAVIS.

STATE OF INDIANA, *Floyd County, ss:*

John S. Davis on oath says that there exists a cause of action as disclosed in the foregoing complaint against said defendants named in said complaint relating to real estate, and that said defendants

104 are necessary parties thereto; and that said defendants William S Pearson, Harvey Seymour, Charles Howard, and Sebra Howard are not residents of the State of Indiana, as affiant is informed and believes.

JOHN S. DAVIS.

Subscribed to and sworn to before me this the 22nd day of August, 1857.

SALEM P. TOWN, *Clerk*,
By R. M. WIER, *Deputy.*

The exhibit mentioned in the foregoing complaint, and marked "A," reads in the words and figures following, to wit:

New Albany and Sandusky City Junction Railroad Company, William Pearson, jr., and Harvey Seymour—"Deed of trust."

This indenture, made this twentieth day of September, one thousand eight hundred and fifty-four, between the New Albany and Sandusky City Junction Railroad Company, a corporation duly constituted as such by the laws of the State of Indiana, of the first part, and William S. Pearson, jr., and Harvey Seymour, of the State of Connecticut, of the second part, witness that, whereas the party of the first
105 part, pursuant to the statutes of said State incorporating said railroad company, and other statutes amendatory thereto, is engaged in constructing its railroad, extending from the city of New Albany, Indiana, to the State line of Ohio, at a point where it intersects and connects with the railroad being constructed by the Sandusky and Louisville Railroad Company, from Huntsville to said State line, said railroad of the party of the first part, being, and to be when completed, about one hundred and ten miles in length, more or less; and whereas said party of the first part being the lawful owner, in fee-simple, of all the real estate, lands, tenements, and hereditaments hereinafter mentioned and described, the same having been conveyed to said party by valid deed duly authenticated and recorded, and clear of all incumbrances in payment of subscriptions to its capital stock, has resolved to raise a sum of money not exceeding one hundred and ten thousand dollars in amount upon a mortgage of said property to the parties of the second part, to aid in the construction of its said railroad, and for that purpose to execute one hundred and ten bonds, for one thousand dollars each, to be negotiated in the city of New York and made payable on the first day of January, one thousand eight hundred and sixty-five, bearing an interest payable semi-annually in the city of New York, without relief from valuation or appraisement laws, and containing a clause permitting the holder thereof to exchange the same at par
106 for shares of stock in said railroad company at any time within five years from the date thereof:

Now, therefore, the said party of the first part, in order to secure the payment of said bonds and interest according to the tenor and effect thereof, and in consideration of one dollar in hand paid at the sealing and delivering hereof by the parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, transferred, and conveyed, and by these presents does grant, bargain, sell, transfer, and convey, to the said parties of the second part, and to their successors in the trust hereby created and assigned, all of the real estate, land, tenements, and hereditaments situated in the city of New Albany and its vicinity, in the county of Floyd, and State of Indiana, appraised by Victor A. Gepin, Samuel H. Owen, and Augustus Bradley to be of the value of one hundred and fifty-four thousand eight hundred and fifty-five dollars, and more particularly and specifically enumerated and described in a schedule of the same, certified by said appraisers to be of the value aforesaid, hereunto annexed and made part hereof: To have and to hold the said premises, and every part and parcel thereof, with the appurtenances, unto the parties of the second part, and their successors in said trust, upon the following trust; that is to say, in case the said party of the first part shall fail to pay the
107 principal or any part thereof, or any of the interest on said bonds at any time when the same may become due and payable according to the tenor thereof when demanded, then, after sixty days from such default, upon request of the holder of such bond, the said parties

of the second part, or their successors in said trust, shall enter and take possession of all or any part of said premises, and, as the attorneys in fact are agents of the said party of the first part, by themselves, or agents, or substitutes, duly constituted, have, use, and employ the same, and all the rents, issues, and profits thereof, making from time to time all needful repairs, alterations, and additions thereto, and, after deducting the expenses of such use, repairs, alterations, and additions, apply the proceeds thereof to the payment of the principal and interest of all said bonds remaining unpaid, or the said parties of the second part, their successors in said trust, at his or their discretion, may, and, on the request of the holders of at least one half of said bonds then due and unpaid and unconverted as aforesaid, or whereon any interest may remain due and unpaid, shall cause the said premises, or so much thereof as shall be necessary to pay and discharge the principal and interest of all such said bonds as may be then due and unconverted as aforesaid, to be sold at public auction in the said city of New Albany, giving at least thirty days' notice of the time, place, and terms of [of] said
108 sale, and of the specific property to be sold, by publishing the same in one or more newspapers of good circulation published in said city, or in any other newspaper, or by handbills, if deemed necessary by said parties of the second part and their successors in said trust, and execute to the purchaser or purchasers thereof good and sufficient deeds of conveyance, in fee-simple, of the same, which shall be as a bar against the party of the first part, their successors and assignees, and all persons claiming under them, of all rights, interest, and claim in and to said premises so sold and conveyed, or any part thereof; and said parties of the second part, or their successors in said trust, shall, after deducting from the proceeds of said sale the costs and expenses thereof, and of managing said property, apply so much of the proceeds as may be necessary to the payment of said principal and interest due and unpaid on such bonds, and pay over any surplus that may remain to the party of the first part. And it is hereby expressly understood and agreed that in no case shall any claim or advantage be taken of any valuation or appraisement or extension laws by said parties of the first part, nor any injunction or stay of proceedings, or any process be applied for or obtained by said party to prevent such entry or sale as aforesaid. And the said party of the first part hereby covenants, for the consideration aforesaid, to execute and deliver any further reasonable and nec-
109 essary conveyance, or conveyances, to the said parties of the second part, their successors in said trust, or assigns, and any purchaser or purchasers at any sale made by them as aforesaid, for more fully carrying into effect the objects hereof. And the said party of the first part hereby covenants, as aforesaid, that the money borrowed upon the sale of said bonds shall be faithfully applied and used for the construction of their railroad as aforesaid, and for no other purpose.

And it is hereby mutually agreed, and these presents are upon this express condition, that on payment of the principal and interest of said bonds, or the conversion thereof into stock in manner aforesaid, the estate hereby granted to the said party of the second part shall be void, and the right to the premises and property hereby conveyed shall revert to and revert in the said party of the first part, without any acknowledgement of satisfaction, reconveyance, re-entry, or other act. And it is further mutually agreed that the parties of the second part, and their successors in said trust, shall only be accountable for reasonable diligence in the management of said trust, and shall not be responsible for malfeasance of any agent employed by them where such agent was

selected with reasonable discretion, and that they shall be entitled to receive proper compensation for every labor or service performed by them in the discharge of their trust. And it is mutually agreed
110 that, in case of the death, mental incapacity, or resignation of said parties of the second part, or either of them, all of their or his estate, right, interest, power, and control in the premises shall be divested, cease, and determine, and the same shall from thenceforth, for the purposes aforesaid, be vested in, and all and singular the trust and duties hereinbefore enumerated shall devolve upon, such other persons as may be appointed to fill the vacancies thus occasioned in the manner herein prescribed without any other or further assurance or conveyance of or for the same; that is to say, in case either one of said parties of the second part shall become divested of his said trust in the manner aforesaid, the remaining party of the second part shall forthwith nominate and appoint some suitable and proper person to fill the vacancy thus occasioned, and shall deliver to the person thus appointed a certificate in writing to that effect, a copy of which certificate shall be endorsed upon this instrument and recorded in the proper recorder's office in Floyd County, Indiana; and if at any time thereafter a vacancy shall occur, it shall be filed in the same manner by the remaining trustee; and in case, from any cause at any time, there should be no trustee remaining to fill a vacancy thus occasioned, or the remaining trustee should neglect or refuse so to do, the holder of said bonds, or any of them, may apply to the Floyd circuit court setting at New Albany, in the State of Indiana, or any other court of competent jurisdiction
111 in said State, upon a reasonable notice given to the party of the first part, to fill such vacancy or vacancies, and thereupon such new trustee shall become vested with all the rights and interests hereby conveyed and vested in the said parties of the second part, and, if necessary, both or either of the parties hereto shall execute any proper releases or conveyances for that purpose.

And it is further mutually agreed that the party of the first part shall remain in possession of all said granted premises, and of the rents and profit thereof, until default be made in the payment of said bonds or interest; and inasmuch as it may be for the advantage of the parties hereto and the holders of said bonds that portions of the property herein granted should be sold and improved before said bonds mature, the party of the first part may sell any one or more of the lots or tract of land [of land] herein or hereby conveyed to the parties of the second part in trust as aforesaid at a price not less than three-fourths of its appraised value, as affixed in the annexed schedule, or any portion of any of said lots or tracts at a price which will be not less than a fair proportion of three-fourths of the appraised value of the whole of such lots or tracts, and convey the same to the purchaser or purchasers respectively upon such terms that if the latter shall, at any time before said bonds mature, in good faith procure and deliver to the par-
112 ties of the second part or their successors to be cancelled an amount of said bonds of which the principal shall be equal to the amount of the purchase-money as above specified, together with all the unpaid coupons belonging thereto; or, if the interest upon all the bonds issued as aforesaid shall be punctually paid when due, and the said purchaser or purchasers shall respectively pay to the parties of the second part or their successors, at the time of the maturity of said bonds, a sum equal to the amount of the purchase-money as above specified for the redemption of said bonds, said purchaser or purchasers respectively shall hold said lots or tracts, or portions of said lots or

tract, so respectively paid for by them, free and clear from the this indenture; but no such sale or sales shall be made without knowledge of the parties of the second part or their successor if they shall object thereto, and said parties of the second part or their successors shall, if they deem it expedient at any time to present the security held by them for the protection of any of said bonds remaining unpaid and uncancelled from being diminished or impaired, entirely prohibit the party of the first part from making such sales, or require such other terms and conditions to be complied with on the part of the party of the first part and any purchasers as they in their discretion shall deem necessary.

113 In testimony whereof the said company has caused its corporate seal to be hereto affixed and these presents to be signed by its president and countersigned by its secretary the day and year first above mentioned.

[L. S.] JAMES MONTGOMERY, *President.*

Countersigned: THOMAS L. SMITH, *Secretary.*

Schedule particularly describing the several parcels of property conveyed in the foregoing deed of trust, with the value affixed to each by the appraisers.

1.—All that part of lots Nos. one and two on Lower Water Street, in the city of New Albany, beginning forty-five west from State street, extending thence westwardly on said Water street twenty-five feet, and back therefrom the same width one hundred and eight feet to a twelve-foot alley, with the right in common with the other owners of parts of said lots one and two to the use of said alley; valued at $1,800

2.—All those lots in the city of New Albany known in Day's Mount Isham plat of a part of said city as lots Nos. forty-three, forty-four, forty-five, forty-six, forty-seven, forty-eight, forty-nine, and fifty, fronting on Upper First Street in said city; valued at $24 per foot $8,040

3.—All those lots in the city of New Albany known in Day's Mount Isham plat as the lots Nos. sixty-six,
114 sixty-seven, and sixty-eight, in Upper Second Street in said city; valued $22 per foot $2,970

4.—All those lots in the city of New Albany in Day's Mount Isham plat as lots Nos. sixty-one, sixty-two, sixty-three, sixty-four, sixty-five, sixty-nine, seventy, and seventy-one, fronting on the old Vincennes road in said city; valued at $40 per foot $8,000

5.—All those lots in the city of New Albany as lots Nos. forty-one, forty-two, forty-three, forty-four, forty-five, on Ferry street, Noyes and Cline's plat; valued at $260 each $1,300

6.—The south half of lot No. twenty-six, in Day's Reimeking's plats, being thirty feet in front by one hundred and twenty feet deep, on the west side of Lower Fifth street, in the city of New Albany, with appurtenances; valued at $1,200

7.—The west half of the southeast quarter of section No. six, town. three south, range six east, in the county of Floyd, State of Indiana, containing eighty acres; valued at $4 per acre $320

8.—All those lots known as Nos. one, three, and five, Upper First street, in the city of New Albany; valued at $75 per foot $11,250

9.—The undivided half of lot No. twenty-eight, on Upper Fourth street, in the city of New Albany; valued at..... $1,000

10.—Lots Nos. two and three, on Beach street, in block C, of plat No. 20, in New Albany; valued at..... $500

115 11th.—A tract of land bounded by a line beginning at a stake in the southeast corner of lot No. three on the map of the city of New Albany, at the east corner of land of Samuel Wilcox, deceased, and running thence N. ½° W. seventy-two and two-thirds poles to a stake; thence south 49° W. forty-six poles to a stake; thence S. ½° E. seventy-two poles to a stone; thence N. ½° E. forty-six poles to the place of beginning—being in the vicinity of the city of New Albany, and containing 20 acres and 142 perches; valued at $200 per acre..... $4,000

12.—A tract of land beginning at a stake in the said east corner of the land of Samuel Wilcox, deceased, mentioned in the discription next above, and bounded by a line running thence S. 49° W. 189 feet; thence N 41½° $393\frac{56}{100}$ feet, to the centre of the Silver Creek road; thence along said road southwardly $206\frac{68}{100}$ feet; thence S. 41½° E. 297 feet to the place of beginning—being near the city of New Albany, and containing one and a half acres; valued at..... $300

13.—Lots Nos. fifty-three, fifty-five, and the west half of fifty-seven on Spring street, (Conner's plat,) in the city of New Albany; valued $800 each lot..... $2,000

14.—All that tract of land in the city of New Albany known as lot No. 27 of survey No. 29 in the Illinois grant, containing $11\frac{91}{100}$ acres, being all that part of the Edward's plat of 16 acres which lies southward of the plank-road to Jeffersonville; valued at $100 per acre..... $8,400

15.—A tract of land situated in Floyd county, Indiana, near the city of New Albany, known as a part of the east
116 half of southeast quarter of section thirty-three in town. 2, south of R. C. E.; bounded by a line beginning on the Boiling Spring road, on the line between Gaudy and Thomas Sinex; running thence with said line to the line of John P. Frank's land; thence westwardly along said line to the line of W'm Drysdale's land; thence southwardly along said line until it strikes the line of land conveyed by Gaudy to Wright; thence eastwardly along said eastern line to the line of the Boiling Spring road; thence along said road ten feet to the place of beginning, containing thirty acres more or less; valued at $200 per acre..... $6,000

16.—Lots Nos. one, two, three, and four, on Scott street, in Moore's plat, of a part of the city of New Albany; valued at $250 each..... $1,000

17.—Lots Nos. ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, and eighteen, on Jackson street, in Moore's plat of a part of the city of New Albany; valued at $2,50 each..... $2,250

18.—All that block or square numbered seven in the plat of the sub-division of the White Hill tract, in the city of New Albany; and also all that part of the Ohio River bank which lies immediately in front of said block or square between the lines produced by the extension of Upper Fifteenth street and extending from the south line of Water street to low-water mark; valued at..... $9,000

19.—A part of lot No. two on Lower Water street, in the city of New Albany, beginning at a point on said
117 Water street twenty-five feet east from the southwest corner of said lot, extending thence eastwardly on said street 25 feet, and running back from said street the same width one hundred and eight feet to a twelve-foot alley, with the use of said alley in common with all other owners of adjoining lots; valued at $1,800

20.—The north half of lot No. 8, on State street, in the city of New Albany, being twenty-five feet in front on said street, extending back therefrom the same width one hundred and twenty feet, with the three-story brick store and warehouse covering the same, and valued at $6,000

21.—A tract of land in the city of New Albany, part of the N. W. ¼ of fractional section No. 10, in town. 3 S., R. 6 E., marked letter "C" on plat No. 15, and on the city map, containing seventeen acres; valued at $235 per acre $4,000

22.—All of lots numbers seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, and twenty-four, on Poplar street, in plat No. 20, in the city of New Albany; valued at $225 each $1,800

23.—All the lots Nos. thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, and thirty-seven, on Elue street, in plat No. 20 of the city of New Albany; valued at $225 each $1,800

24.—All the lots numbers twenty-five, twenty-six,
118 twenty-seven, twenty-eight, and twenty-nine, on Shipping street, in plat No. 20 of the city of New Albany; valued at $225 each $1,125

25.—All those parts of lots, with the appurtenances, being seventy-six feet in front off the eastwardly side of lot number thirty-nine, on Lower High street, in the city of New Albany, and thirteen feet in front off the westwardly side of lot number thirty-seven, on the same street, both parts of said lots making thirty-nine feet front on said Lower High street, extending the same width ninety feet, having thereon two brick dwelling-houses; valued at $1,500 each tenement $3,000

26.—A tract of land in the city of New Albany, being the north half of that part of the northwest quarter of section thirty-four, in town. 2 S., range 6 E., lying west of the Vincennes plank-road, except one $\frac{32}{100}$ acres, deed to George Lyman, containing eighty acres, more or less; valued at $400 per acre $32,000

27.—A tract of land in the city of New Albany, being all that part of letter "H" in number 42 of the Illinois grant, which, beginning at a stake on the east side of Vincennes street, on plat number 63, 450 feet north from the north line of Beeler street, runs thence north 40° W. 480 feet to what is called the Beech farm, (letter "C;") thence N. 50° E. 1,419 feet to a small beech tree in the southeastern corner of said Beech farm; from thence south 40° E. 480
119 feet to a stake; thence south 50° W. 1,419 feet to the place of beginning, containing $15\frac{63}{100}$ acres; valued at $18,000

28.—The undivided one-third part of that out-lot in the city

of New Albany known as lot No. 15, in the northern quarter of section No. 34, town. 2 S., R. 6 E., containing 19 $\frac{55}{100}$ acres; valued at $4,000

29.—The north half of lot number twenty-seven, on Upper First street, in the city of New Albany, being twenty-five feet in front on said street, and extending back, the same width, one hundred and twenty feet; valued at $2,000

30.—The north half of lot No. two, on State street, in the city of New Albany, being twenty-five feet in front on said street, and extending back same width one hundred and twenty feet; valued at $2,000

31.—All those lots in the city of New Albany comprised in all of lot No. one, in Clark and Elderkin's plat of part of letter "E," in No. 28, in the Illinois grant; that part of letter "D," in Lindley and Day's east plat, when said street shall be opened sixty feet wide; thence running N. 40° W. with said produced line of East street, 60 feet wide, 559 feet, more or less; thence 50° E. 16 feet, more or less, to the northwest corner of said lot No. 1; thence S. 40° E. with the line of the Chambers' tract, 563 feet, more or less, to the place of beginning; and also the right and
120 interest held by grantors in and to the 30 feet of ground by 559 feet in length, adjoining the land last above described, which is to form the half of said East street; valued at $8,000

Making the value of the whole $154,855

The undersigned, having been rquested to appraise the several parcels of land described in the foregoing schedule, do hereby certify that they have carefully examined the same, and have affixed to them respectively the sums therein specified, amounting to one hundred and fifty-four thousand eight hundred and fifty-five dollars, which they believe to be their fair value at this time at the current selling rates of land in the city of New Albany and its vicinity, of the same quality, and similarity situated.

New Albany, Ind., September 15th, 1854.

VICTOR A. PEPIN. [L. S.]
SAMUEL H. OWEN. [L. S.]
AUGUSTUS BRADLEY. [L. S.]

STATE OF INDIANA, *Floyd County, sct:*

The undersigned, a notary public in and for said county, does hereby certify that Victor A. Pepin, president of the Merchants and Mechanics' Bank of this city, Samuel H. Owen, recorders of deeds, and Augustus Bradley, auditor of said county, are personally known to me; that the above are their genuine signatures, and that they are all gentle-
121 men of character, respectability, property, and well acquainted with the value of real estate in this city and vicinity.

Witness my hand and official seal hereunto affixed at the city of New Albany this 15th day of September, 1854.

[L. S.] ELIJAH SABIN, *N. P.*

STATE OF INDIANA, *Floyd County, sct:*

This day personally appeared before me, the recorder of deeds in and for

said county, James Montgomery, president, and Thomas L. Smith, secretary of the New Albany and Sandusky City Junction Railroad Company, and acknowledged that they had signed the foregoing indenture, and affixed its corporate seal thereto as and for their act and deed of said company.

In testimony whereof I have hereunto affixed my signature and official seal this 20th day of September, 1854.

[L. S.] SAMUEL H. OWEN,
Recorder Floyd Co.

RECORDER'S OFFICE,
September 20th, 1854.

STATE OF INDIANA, *Floyd County, sct:*

I, Sam'l H. Owen, recorder of said county, do certify that the foregoing mortgage was filed for record and recorded this 20th day of Sept., 1854, at 6 o'clock a. m., in mortgage record, vol. 1, pages 341, 342, 343, 344, 345, 346, 347, 348.

Witness my hand and official seal.

[L. S.] SAMUEL H. OWEN.

122 *New Albany and Sandusky Junction R. R. Company—Supplemental agreement to No.* 643.

William G. Pearson, jr., and Harvey Seymour, October 7th, 1854—Supplemental agreement.

It is further hereby agreed by the parties to the foregoing indenture, in consideration of the premises therein mentioned before the sale of any of the bonds secured thereby, and to facilitate the sale of said bonds, that if the party of the first part shall at any time be in default in the payment of the principal or interest of any of said bonds, according to the tenor and effect thereof, then the principal of all said bonds shall forthwith become due and payable from the time of such default; and any suit or action in law or equity may be commenced against the said party of the first part to recover or collect said principal and interest thereon in the same manner as if this promise and agreement were included in and made a part of said bonds; and after sixty days from such default, the said parties of the second part shall take possession of all the premises described in said indenture, and at their discretion use or sell the same for the payment of all or any of said bonds, and the interest thereon.

In testimony whereof the said company has caused its corporate seal to be hereto affixed, and these presents to be signed by its president and countersigned by its secretary, this Oct. 7th, 1854.

[L. S.] J. MONTGOMERY, *President.*

THOMAS L. SMITH, *Secretary.*

123 STATE OF INDIANA, *Floyd County, sct:*

This day personally appeared before me, the recorder of deeds in and for said county, James Montgomery, president, and Thomas L. Smith, secretary of the New Albany and Sandusky City Junction Railroad Company, and acknowledged that they had signed the foregoing supplemental agreement, and affixed its corporate seal thereto as and for the act and deed of the said company.

(SEAL'S) In testimony whereof I have hereunto affixed my signa-
(PLACE.) ture and official seal this seventh day of October, 1854.

SAMUEL H. OWEN.

Filed for record of supplemental agreement this 7th day of October, 1854, at 4 o'clock p. m., and recorded in mortgage record, vol. 1, page 359 and 360.

SAMUEL H. OWEN,
Recorder F. C.

STATE OF INDIANA, *Floyd County, set:*

I, James G. Harrison, recorder of said county, hereby certify that the within is a true, full, and complete copy of a mortgage, and also of a supplemental mortgage, recorded in book of mortgages, vol. 1, pages 341, 342, 343, 344, 345, 346, 347, 348, and 359 & 360, as appears on record at this office.

Witness my hand and official seal this 20th day of August, 1857.

[L. S.] JAMES G. HARRISON,
Recorder Floyd County.

124 The bonds marked 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, mentioned in the plaintiff's complaint, were not filed therewith.

And afterward, at the October term of the said Floyd circuit court, on the 14th day of November, 1857:

Comes now the plaintiff by his attorneys, and on his motion it is ordered that this action be dismissed as to the said John B. Winstandly and Charles Bowman; and, on his further motion, the said Walter N. Mann, Charles B. Applegate, and William B. Lent are made parties defendant hereto. And said last-named defendants now come, by their attorneys, and enter their appearance to this action, and a rule is awarded against all said defendants to answer herein; and thereupon comes said railroad company, by her attorneys, and files her answer herein, admitting the execution and delivery of the bonds and mortgage herein sued upon, and asks that said mortgage may be foreclosed; and said other defendants, except said Winstandly and Bowman, also file their answers herein; which read in the words and figures following, to wit:

In the Floyd circuit court, Oct. term, 1857.

VICTOR A. PEPIN
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, W'm S. Pearson, and others.

James Montgomery, one of said defendants in this suit, answers the complaint of said plaintiff, and says that he admits the making of said bonds and the giving of the mortgage, as stated in the complaint, and he also states that he is the holder and owner of six of those
125 bonds for one thousand dollars each, together with the unpaid interest upon the same, amounting to one thousand and fifty dollars, in all the sum of seven thousand and fifty dollars; which bonds are numbered 44, 45, 46, 47, 48, and 108, and are due and unpaid. Wherefore said Montgomery prays that said mortgaged lands may be sold to satisfy the same, and for all other proper relief in the premises.

Said bonds and interest warrants are herewith filed and made a part of this answer.

OTTO AND DAVIS,
Attorneys for Montgomery.

The bonds mentioned in the foregoing answer were not filed with the same.

In the Floyd circuit court, October term, 1857.

VICTOR A. PEPIN.
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, W'm J. Pearson, and others.

John S. Davis, one of the defendants in this suit, answers the complaint herein, and says he admits the making of all said bonds and giving the mortgage as stated in the complaint, and further states that he is the holder and owner of six of said bonds for one thousand dollars each, together with the unpaid interest warrants upon the same, amounting to the sum of one thousand and fifty dollars, making in all the sum of seven thousand and fifty dollars; which bonds are numbered 24, 25, 26, 27, 28, and 110, and are wholly unpaid, as well as the interest thereon, and he therefore prays that said morgaged lands may be
126 sold to satisfy the same, and for all other proper relief in the premises.

Said bonds and unpaid interest warrants are herewith filed and made part hereof.

OTTO AND DAVIS, *Attorneys.*

(The bonds mentioned in the foregoing answer were not filed therewith.)

In the Floyd circuit court, October term, 1857.

VICTOR A. PEPIN
vs.
N. A. AND S. C. J. R. R. CO. ET AL.

William M. Wier, one of the defendants in this action, answers the complaint herein, and says he admits the making of all said bonds and giving the mortgage to secure their payment, as is alleged in said complaint. He further says he is the holder and owner of five of those said bonds for one thousand dollars each, to wit, Nos. 62, 63, 64, 65, and 66, together with the unpaid interest warrants upon the same, amounting together to five thousand eight hundred and seventy-five dollars, which are unpaid. Wherefore he asks judgment for six thousand dollars, and for the foreclosure of the mortgage and the sale of the property, or so much thereof as may be necessary, to satisfy his debt, and for other proper relief.

Said bonds and interest warrants are herewith filed and made part hereof.

HOWK AND WIER, *Attorneys.*

(The bonds mentioned in the foregoing answer were not filed therewith.)

In the Floyd circuit court, October term, 1857.

VICTOR A. PEPIN
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, W'm S. Pearson, and others.

127 John S. McDonald, one of the defendants in this suit, answers the complaint herein, and says he admits the making of the bonds and giving the mortgage, as stated in the complaint, and states that he is the holder and owner of five of said bonds for one thousand dollars each, together with the unpaid interest warrants upon the same, amounting to eight hundred and seventy-five dollars, making in all the sum of five thousand eight hundred and seventy-five dollars; which bonds are numbered fifty-seven, fifty-eight, fifty-nine, sixty, and sixty-one, and are all due and unpaid. Wherefore said McDonald prays that said mortgaged lands may be sold to satisfy the same, and for all other proper relief in the premises.

Said bonds and interest warrants are herewith filed and made part hereof.

OTTO AND DAVIS,
Attorneys for McDonald.

(The bonds mentioned in the foregoing answer were not filed therewith.)

VICTOR A. PEPIN
vs.
THE NEW ALBANY AND SANDUSKY C. J. R. R. Co. et al.

Thomas L. Smith, one of the defendants in this suit, for answer to the plaintiff, says he admits the making of said bonds and mortgage as stated in said complaint. He further states that he is the holder and owner of five of said bonds for one thousand dollars each, with the unpaid interest warrants thereupon, amounting to eight hundred
128 and seventy-five dollars, making in all five thousand eight hundred and seventy-five dollars. Said bonds are numbered 29, 30, 40, 41, and 42, and are due and unpaid. He therefore prays said mortgaged property may be sold to satisfy the same, and for all other proper relief.

Said bonds and coupons are filed herewith and made part hereof.

SMITH AND KERR,
Attorneys f. T. L. Smith.

(Said bonds mentioned in the foregoing answer were not filed therewith.)

The Floyd circuit court, October term, 1857.

VICTOR A. PEPIN
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

Samuel H. Patterson, one of the defendants in this suit, answers the

complaint herein, and says he admits the making of all said bonds and giving the mortgage as stated in the complaint, and states that he is the holder and owner of one of said bonds for one thousand dollars, together with the unpaid interest warrants upon the same, amounting to the sum of one hundred and seventy-five dollars, which bond is numbered 72. and is due and unpaid. Therefore said Patterson prays that said mortgaged lands be sold to satisfy the same, and for all other proper relief in the premises.

Said bond and interest warrant are herewith filed and made part hereof.

OTTO AND DAVIS, *Attorneys.*

(The bond mentioned in the foregoing answer was not filed therewith.)

In the Floyd circuit court, October term, 1857.

VICTOR A. PEPIN
vs.
NEW ALBANY AND SANDUSKY CITY J. R. R. Co. et al.

129 Said Charles Howard and Sebra Howard, defendants in this suit, for answer to the complaint of said plaintiff say they admit the making of said bonds and the execution of said mortgage. They further say that sixty-seven of said bonds, with the coupons attached, were paid to them by said company, and received by them as part payment of work done by them under a contract for the construction of the railroad of said company. They further say that all of said sixty-seven bonds were sold by them for a full and adequate consideration, and they believe the following persons are now the bona-fide holders and owners of the same, to wit:

Victor A. Pepin	12	of	said	bonds	and	coupons.
John Phelps Putnam	6	"	"	"	"	$6,210
John Phelps Putnam, trustee of Samuel T. Anderson and wife.	3	"	"	"	"	$3,105
Sarah Coit Day	5	"	"	"	"	$5,175
Elijah De Witt	7	"	"	"	"	$7,245
G. R. and H. C. Starr	4	"	"	"	"	$4,140
Herman Ely	8	"	"	"	"	$8,280
C. Arthur Ely, by his ag't Herman Ely	14	"	"	"	"	$14,490
Augustus H. Moss	1	"	"	"	"	$1,035
Samuel H. Patterson	1	"	"	"	"	$1,035
Walter Mann	1	"	"	"	"	$1,035
Rollin C. De Witt	5	"	"	"	"	$5,175
	67					

All of said bonds are for one thousand dollars each, and these respondents disclaim any further interest and prays that said mort-
130 gaged property may be sold to pay said persons the principal and interest due on said bonds.

SMITH AND KERR,
Attorneys for C. & S. Howard.

In the Floyd circuit court, October term, 1861.

VICTOR A. PEPIN
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company, W'm S. Pearson, and others.

Charles B. Applegate, one of the defendants herein, hereby enters his appearance, and answers the complaint of said plaintiff, and says that he admits the making of all those said bonds and the giving of the mortgage, as stated in the complaint; and he also states that he is the holder and owner of six of those bonds for one thousand dollars each, together with the unpaid interest warrants thereupon, amounting to the sum of one thousand and fifty dollars, making in all the sum of seven thousand and fifty dollars; which bonds are numbered 43, 49, 54, 55, 56, and 109, and are due and unpaid. Wherefore said Applegate prays that said mortgaged lands may be sold to satisfy the same, and for all other proper relief in the premises.

Said bonds and interest warrants are herewith filed and made part hereof.

OTTO AND DAVIS.
Attorneys for Applegate.

(The bonds mentioned in the foregoing answer were not filed therewith.)

In the Floyd circuit court, October term, 1857.

VICTOR A. PEPIN
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company, W'm S. Pearson, et al.

131 William B. Lent, one of the defendants in this suit, answers this complaint, and says that he admits the making of the said bonds and giving the mortgage, as stated in the complaint, and states that he is the holder and owner of five of said bonds for one thousand dollars each, together with the unpaid interest warrants on the same, amounting to the sum of eight hundred and seventy-five dollars, making in all the sum of five thousand eight hundred and seventy-five dollars; which bonds are numbered 67, 68, 69, 70, and 71, and are due and unpaid. Wherefore said Lent prays that the said mortgaged lands may be sold to satisfy the same, and for all other proper relief in the premises.

Said bonds and interest warrants are herewith filed and made part hereof.

OTTO AND DAVIS,
Attorneys for Lent.

(Said bonds mentioned in the foregoing answer were not filed therewith.)

(The answers of defendants William S. Pearsons, jr., Harvy Seymour, and Walter Mann cannot be found amongst the files.)

And this cause being at issue is, by the consent of parties for trial,

submitted to the court without the intervention of a jury; and the court, having fully heard and examined the allegations of the parties and the proofs adduced, finds that the said New Albany and Sandusky City Junction Railroad Company, by reason of said bonds and mortgage, is indebted to William S. Pearson, jr., and Harvey Seymour, as
132 trustees in trust for the use and benefit of the for the following persons in the following sums, to wit: six thousand two hundred and ten dollars, for the use of John Phelps Putnam; in the sum of three thousand one hundred and five dollars, for the use of Samuel J. Anderson and wife; in the sum of five thousand one hundred and seventy-five dollars, for the use of Sarah Coit Day; in the sum of seven thousand and two hundred and forty-five dollars, for the use of Elijah De Witt; in the sum of five thousand one hundred and seventy-five dollars, for the use of Rollin C. De Witt; in the sum of four thousand one hundred and forty dollars, for the use of G. R. and H. C. Starr; in the sum of eight thousand two hundred and eighty dollars, for the use of Herman Ely; in the sum of fourteen thousand four hundred and ninety dollars, for the use of C. Arthur Ely; and in the sum of one thousand and thirty-five dollars, for the use of Augustus H. Moss—making in the aggregate the sum of fifty-four thousand eight hundred and fifty-five dollars; and that said company is indebted to the plaintiff, by reason of the said bonds and mortgage, in the sum of eighteen thousand two hundred and ninety-five dollars, and to the other said defendants, except the said Winstandley and Bowman, severally in the following amounts, namely: to said Walter Mann, in the sum of one thousand and thirty-five dollars; to the said Samuel H. Patterson, in the sum of one thousand and thirty-five dollars; to the said John S. Davis, in the sum of seven thousand
133 and [and] fifty dollars; to the said Thomas L. Smith, in the sum of five thousand eight hundred and seventy-five dollars; to the said Charles B. Applegate, in the sum of seven thousand and fifty dollars; to the said James Montgomery, in the sum of seven thousand and fifty dollars; the said John S. McDonald, in the sum of five thousand eight hundred and seventy-five dollars; to the said William M. Wier, in the sum of five thousand eight hundred and seventy-five dollars; and to the said William B. Lent, in the sum of five thousand eight hundred and seventy-five dollars—each of said sums aforesaid to be levied and collected without any relief from valuation or appraisement laws; and that the mortgage herein sued upon was executed on said railroad company to secure the payment of said several sums, and that said mortgage ought to be foreclosed.

It is now, therefore, finally considered and decreed by the court that the said William S. Pearson, jr., and Harvey Seymour, as such trustees, and for the use aforesaid, do recover of said company the said sums of fifty-four thousand eight hundred and fifty-five dollars and costs of suit; and that the said Victor A. Pepin recover of said company the sum of eighteen thousand two hundred and ninety-five dollars and costs of suits; and that the said Walter Mann and Samuel H. Patterson do, each of them, recover of said company the said sum of ten hundred and
134 thirty-five dollars and the costs; and that the said Charles B. Applegate and James Montgomery and John S. Davis do each recover of said company the said sum of seven thousand and fifty dollars each and their costs; and that the said Thomas L. Smith, John S. McDonald, William M. Wier, and William B. Lent do each recover of said company the said sum of five thousand eight hundred and twenty-five dollars with their costs, each of the sums aforesaid to be levied and collected as aforesaid; and that said mortgage be foreclosed, and said

mortgaged premises, or so much thereof as may be necessary to pay said several sums, with interest and all costs, shall be sold as hereinafter ordered and directed; and that upon the sale and conveyance of any of said mortgaged premises, as hereinafter provided, the equity of redemption of said railroad company in and to the same be forever barred and foreclosed.

Said mortgaged premises are described as follows, to wit:

1st. All that part of lots Nos. one and two on Lower Water street, in the city of New Albany, beginning forty-five feet west from State street; extending thence westwardly on said Water street twenty-five feet, and back therefrom, the same width, one hundred and eight feet to a twelve-foot alley, with the rights in common with the other owners of parts of said lots one and two to the use of this said alley.

2nd. All those lots in the city of New Albany known in Day's Mount Isham plat of a part of said city as lots Nos. forty-three, forty-four, forty-five, forty-six, forty-seven, forty-eight, forty-nine, and fifty, fronting
135 on Upper First street in said city.

3rd. All those lots in the city of New Albany, known in Day's Mount Isham plat as lots Nos. sixty-six, sixty-seven, and sixty-eight, on Upper Second street in said city.

4th. All those lots in the city of New Albany, known in Day's Mount Isham plat as lots Nos. sixty-one, sixty-two, sixty-three, sixty-four, sixty-five, sixty-nine, seventy, and seventy-one, fronting on the old Vincennes road in said city.

5th. All those lots in the city of New Albany, known as lots Nos. forty-one, forty-two, forty-three, forty-four, forty-five, on Ferry street, (Noyes and Cline's plat.)

6th. The south half of lot No. twenty-six, in Day's Reineking plat, being thirty feet in front by one hundred and twenty feet deep, on the west side of Lower Fifth street, in the city of New Albany, with appurtenances.

7th. The west half of the southeast quarter of section No. six, town. three, range six east, in the county of Floyd, and State of Indiana, containing eighty acres.

8th. All those lots, known as Nos. one, three, and five, on Upper First street, in the city of New Albany.

9th. The undivided half of lot No. twenty-eight on Upper Fourth street in the city of New Albany.

10th. Lots Nos. two and three on Beech street, in block 6 of plat 20, in the city of New Albany.

11th. A tract of land bounded by a line beginning at a stake on the southeast corner lot No. three, on the map of the city of New Albany, at the east corner of the land of Samuel Wilcox, deceased; and running thence N. 42° W. seventy-two and two-thirds poles to a
136 stake; thence S. 49° W. forty-six poles to a stake; thence S. 42° E. seventy-two poles to a stone; thence N. 49° E. forty-six poles to the place of beginning—being in the vicinity of New Albany, and containing 20 acres and 142 perches.

12th. A tract of land beginning at a stake in the said east corner of the land of Samuel Wilcox, deceased, mentioned in the description next above, and bounded by a line running thence S. 49° W. 189 feet; thence N. 41½° W. 373 $\frac{56}{100}$ feet to the centre of the Silver Creek road; thence along said road southwardly 206 $\frac{58}{100}$ feet; thence S. 41½° E. 297 feet to the place of beginning—being near the city of New Albany, and containing one and a half acres.

13th. Lots Nos. fifty-three, fifty-five, and the west half of fifty-seven, on Spring street, (Conner's plat,) in the city of New Albany.

14th. All that tract of land in the city of New Albany, known as lot No. 27 of survey No. 29, in the Illinois grant, containing 11 $\frac{20}{100}$ acres, being all that part of the Edwards' plat of 18 acres which lies southward of the plank-road to Jeffersonville.

15th. A tract of land situated in Floyd County, Indiana, near the city of New Albany, known as a part of the east half of the S. E. quarter of section 33, in town. 2 S., of R. 6 E., bounded by a line beginning on the Boiling Spring road on a line between Gaudy and Thomas Sinex; runni'g thence with the said line to the line of John P. Frank's land;
137 thence westwardly along said line to the line of William Drysdale's land; thence southwardly along said line until it strikes the line of land heretofore conveyed by Gaudy to Wright; thence eastwardly along said eastern line to the line of the Boiling Spring road; thence along said road ten feet to the place of beginning—containing thirty acres more or less.

16th. Lots Nos. one, two, three, and four, on Scott street, in Moore's plat, in the city of New Albany.

17th. Lots Nos. ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, and eighteen, on Jackson street, in Moore's plat of a part of the city of New Albany.

18th. All that block or square numbered seven in the plat of the subdivision of the Whitehill tract, in the city of New Albany, and also all that part of the Ohio River bank which lies immediately in front of said block or square, between the line produced by the extension of Upper Fifteenth and Upper Sixteenth streets, and extending from the south line of Water street to low-water mark.

19th. A part of lot No. two on Lower Water street, in the city of New Albany, beginning at a point on said Water street twenty-five feet east from the southwest corner of said lot, extending eastward on said street twenty-five feet, and running back the same width one hundred and eight feet to a twelve-foot alley, with the right to the use of said alley in common with owners of adjoining lots.

138 20th. The north half of lot No. 8 on State street, in the city of New Albany, being twenty-five feet in front on said street, and extending back therefrom the same width one hundred and twenty feet, with the three story brick store and warehouse covering the same.

21st. A tract of land in the city of New Albany, a part of the N. W. quarter of fractional section No. 10 in T. E. S., R. 6 E., marked letter "C" on plat No. 15 and on the city map, containing seventeen acres.

22nd. All the lots Nos. seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, and twenty-four, on Poplar street, in plat 20 in the city of New Albany.

23. All the lots Nos. thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, and thirty seven, on Elm street, in plat No. 20 of the city of New Albany.

24. All of lots Nos. twenty-five, twenty-six, twenty-seven, twenty-eight, and twenty-nine, on Shipping street, in plat No. 20 of the city of New Albany.

25th. All those parts of lots, with appurtenances, being twenty-six feet in front off the eastwardly side of lot number thirty-nine, on Lower High street, in the city of New Albany, and thirteen feet in front off the westwardly side of lot number thirty-seven on the same street, both parts of said lots making thirty-nine feet in front on said Lower High

street, and extending back the same width ninety feet, having thereon two brick dwelling-houses.

139 26. A tract of land in the city of New Albany, being the north half of that part of the northwest quarter of section thirty-four, in town. 2 S., of R. 6 E., lying west of the Vincennes plank-road, except $1\frac{33}{100}$, deeded to George Lyman, containing eighty acres, more or less.

27. A tract of land in the city of New Albany, being all that part of letter "H" in No. 42 of the Illinois grant, which, beginning at a stake at the east side of Vincennes street, on plat No. 63, 450 feet north from the north line of Beeler street, runs thence north 40° W. 480 feet to the line of what is called Beach farm, (letter "C;") thence N. 50° E. 1,419 feet to a small beech tree in the southeastern corner of said Beach farm; thence S. 40° E. 480 feet to a stake; thence S. 50° W. 1,419 feet to the place of beginning, containing $15\frac{63}{100}$ acres.

28th. The undivided one-third part of that out-lot in the city of New Albany, known as lot No. 15, in the northwest quarter of section No. 34, town. 2 S., R. 6 E., containing $19\frac{56}{100}$ acres.

29. The north half of lot No. twenty-seven on Upper First street, in the city of New Albany, being twenty-five feet in front on said street, and extending back from said street the same width one hundred and twenty feet.

30th. The north half of lot number two on State street, in the city of New Albany, being twenty-five feet in front on said street, and extending back same width one hundred and twenty feet.

31st. All those lots in the city of New Albany comprised in all
140 of lot No. 1 in Clark and Elderkin's plat of a part of letter "E" in No. 28 in Illinois grant; that part of letter "D" in Lindsley and Day's east plat, and that part of lot letter "K," and others in Day's plat of Providence; and part of letter "D" in No. 28 Illinois grant, which is thus discribed: Beginning on the north line of the New Albany and Jeffersonville plank-road at the west line of the Chambers tract, and running thence westwardly on the line of said plank-road sixteen feet, more or less, to the eastern produced line of East street, in Lindsley and Day's east plat, when said street shall be opened sixty feet wide; thence running N. 40° W. with said produced line of East street, 60 feet wide, 559 feet, more or less; thence N. 50° E. 16 feet, more or less, to the northwestern corner of lot No. 1; thence S. 40° E. with the line of the Chambers' tract 563 feet, more or less, to the place of begining. Also all the rights and interests held by the granters in and to the 30 feet of ground by 559 feet in length adjoining the land above described, which is to form the half of said East street.

It is further ordered that the said William S. Pearson, jr., and Harvey Seymour be allowed the sum of five hundred dollars each for their services as such trustees, to be taxed as cash herein.

And it is further ordered that the proceeds of the sale of said mortgaged property, and any part thereof, as the same shall be received, shall be applied, first, to the payment of all costs herein and the expenses of the sale of said premises; and, secondly, to the payment of all the aforesaid claims of the several parties hereto pro rata.

141 It is further ordered by the court, with consent of all the parties hereto, that the sheriff of Floyd County, now Charles Frederick, esqr., be, and he is hereby, appointed a commissioner of this court to sell and convey said mortgaged premises in the manner and upon the terms following, to wit: Such sale shall be made at public auction, as lands are sold on execution; but, before any such sale is

made, said commissioner shall give not less than sixty days' notice of the time, place, and terms of sale, including a discription of the property to be sold, by publication in two daily and weekly newspapers of general circulation printed in said Floyd County, and by posting up printed handbills in at least ten public places in the said county; and said mortgaged premises shall be sold in parcels; and any of said property shall not be town lots. The said parcels may consist of such subdivisions of the tracts discribed in the mortgage as may be advantageously made.

One-fourth of the purchase-money shall be paid cash at the time of sale, and the other three-fourths in two equal payments in one and two years, respectively, from the date of such sale, with interest from date, which shall be evidenced by notes, waiving the benefit of all valuation or appraisement laws, secured by a mortgage on the premises sold, said notes and mortgages being executed to said commissioner in trust for the use of the several parties herto entitled to the proceeds thereof.

Upon the receipt of such payment, such notes, and mortgage, said
142 commissioner shall [shall] execute to the said purchasers, respectively, a proper deed of conveyance of all the rights, interests, an title of said railroad company in and to said property. And said commissioner, upon the receipt of any such notes, money, and mortgages, shall immediately pay and deliver the same to the clerk of this court, taking his receipt therefor; and all money so received by said clerk shall be by him, from time to time, applied and paid out as hereinbefore declared.

It shall be the duty of said commissioner, upon the request of any one or more of the parties hereto entitled to payment from the proceeds of said mortgaged premises, or their attorneys, to proceed to advertise and sell said mortgaged premises as hereinbefore described, and he may adjourn and continue such sale from day to day until the whole be sold; and if any of said property cannot be sold at such sale for want of bidders, he may adjourn to any future time not exceeding six months, giving notice by publication, as aforesaid, and may, for the same cause, again adjourn the sale from time to time until the whole be sold. Said commissioner shall report his proceedings in the premises to the court at its next term. This cause is continued.

And afterwards, to wit, at the April term of said Floyd circuit court, on the 24th day of May, 1858:

Comes now Charles Frederick, heretofore appointed a commissioner to sell the mortgaged premises discribed in the order an decree of the court herein at the last term, and in open court returns his
143 report, under oath, of his proceedings in the premises, as such commissioner, in words and figures as follows, to wit:

To the honorable the Floyd circuit court:

The undersigned, appointed by this honorable court a commissioner in the above-entitled action to sell the real estate hereinafter described under the order of said court, would respectfully submit the following report of his proceedings in the premises:

After advertising the time and place of sale in the manner prescribed by the order of this honorable court, the undersigned, commissioner as aforesaid, on the thirteenth day of March, A. D. 1858, between the hours of ten o'clock a. m. and four o'clock p. m. of said day, at the door of the court-house of Floyd County, Indiana, after first offering the rents and profits of the several lots and parcels of land hereinafter de-

scribed for a term of years not exceeding seven, and receiving no bid therefor, then and there seperately offer and sell at public auction each of said lots or parcels of land in fee-simple to the persons hereinafter named, in the manner and for the prices following, to wit: All that part of lots Nos. one and two on Lower Water street in the city of New Albany, beginning forty-five feet west from State street, extending thence westwardly on said Water street twenty-five feet, and back therefrom one hundred and eight feet the same width to a twelve-foot alley, with the right in common with other owners of parts of said lots one and two to the use of said alley for the sum of
144 five hundred and twenty-five dollars. Lot No. forty-three, in Days' Mount Isham plat of a part of the city of New Albany, for the sum of eighty-five dollars; lots Nos. forty-four, forty-five, forty-six, forty-seven, forty-eight, and forty-nine in the same plat, each for the sum of one hundred dollars; and lot No. fifty in the same plat, for the sum of one hundred and thirty dollars—all of said lots fronting on Upper First street in said city. Lot No. sixty-six in Day's Mount Isham plat, for seventy-five dollars; lot No. sixty-seven in the same plat, for one hundred and seven $\frac{50}{100}$ dollars; and lot No. sixty-eight in the same plat, for one hundred and thirty-five dollars—all of said lots fronting on Upper Second street, in the said city of New Albany. Lot No. sixty-one in Day's Mount Isham plat, for sixty-five dollars; lot No. sixty-two in the same, for sixty-five dollars; lot No. sixty-three in the same plat, for one hundred and ten dollars; lot No. sixty-four in the same plat, for one hundred and ten dollars; lot No. sixty-five in the same plat, for one hundred and thirty-five dollars; lot No. sixty-nine in the same plat, for eighty-five dollars; lot No. seventy in the same plat, for sixty-five dollars; and lot No. seventy-one in the same plat, for sixty-five dollars—all said lots fronting on the old Vincennes road, in the city of New Albany. Lot No. forty-one, on Ferry street, in Noyes and Cline's plat, for forty dollars; lot No. forty-two on said street, in said plat, for thirty-five dollars; lot No. forty-three
145 on said street, in said plat, for thirty-five dollars; lot No. forty-four on said street, in said plat, for thirty-five dollars; lot No. forty-five on said street, in said plat, for forty-three dollars. The south half of lot No. twenty-six in Days' Reineking plat, being thirty feet in front by one hundred and twenty feet deep on the west side of Lower Fifth street, in the city of New Albany, with the appurtenances, for four hundred and sixty dollars. Lot No. 1 on Upper First street, in the city of New Albany, for eight hundred dollars; lot No. three on Upper First street, for eight hundred and five dollars; and lot No. five on said street, for nine hundred and seventy-five dollars. The undivided half of lot No. twenty-eight on Upper Fourth street, in the city of New Albany, for one hundred dollars. Lots Nos. two and three on Beach street, in block "C" of plat No. twenty, in the city of New Albany, each for the sum of fifty-five dollars. A tract of land bounded by a line beginning at a stake in the southeast corner of lot No. three on the map of the city of New Albany, at the east corner of the land of Samuel Wilcox, deceased, and running thence north 42° west seventy-two and two-thirds poles to a stake; thence south 49° west forty-six poles to a stake; thence south 42° east seventy-two poles to a stone; thence north 40° east forty-six poles to the place of beginning, being in the vicinity of New Albany, and containing twenty acres and one hundred and forty-
146 two perches, for one thousand and forty-four $\frac{35}{100}$ dollars. Lot No. fifty-three on Spring street, in Conner's plat, in the city of New Albany, for two hundred and sixty-five dollars; lot No. fifty-five in said

plat, on said street, for two hundred and seventy-five dollars; and the west half of lot No. fifty-seven on said street, in said plat, for one hundred and fifty dollars. All that tract of land in the city of New Albany known as lot No. twenty-seven, of survey No. twenty-nine in the Illinois grant, containing eleven $\frac{91}{100}$, being all that part of the Edwards' plat of 18 acres which lies southward of the plank-road to Jeffersonville, for five hundred and ninety-five $\frac{50}{100}$ dollars. Lot No. one on Scott street, in Moore's plat, of a part of the city of New Albany, for thirty-five dollars; lot No. two in said plat, and on said street, for forty-one dollars; and lots Nos. three and four on said street, [in said street,] each for the sum of forty-three dollars. Lot No. ten on Jackson street, in Moore's plat, of a part of the city of New Albany, for thirty-six dollars; lot No. eleven on said street, in said plat, for forty-five $\frac{50}{100}$ dollars; lot No. twelve on said street, in said plat, for fifty $\frac{50}{100}$ dollars; lot No. thirteen on said street, in said plat, for fifty dollars; lot No. fourteen on said street, in said plat, for forty-six dollars; lot No. fifteen on said street, and in said plat, for forty-five dollars; lot No. sixteen in said plat, on said street, for forty-nine dollars; lot No. seventeen on said street, in said plat, for fifty $\frac{50}{100}$ dollars; lot No. eighteen on said street, in said
147 plat, for fifty dollars. All that block or square numbered seven, in the plat of the subdivision of the White Hill tract, in the city of New Albany, and also that part of the Ohio River bank which lies immediately in front of said block or square, between the lines produced by the extension of Upper Fifteenth street and Sixteenth street, and extending from the south line of Water street to low-water mark, for the sum of thirteen hundred dollars. A part of lot No. two on Lower Water street, in the city of New Albany, beginning at a point on said Water street twenty-five feet east from the southwest corner of said lot, extending thence eastward on said street twenty-five feet, and running back from said street the same width one hundred and eight feet to a twelve-foot alley, with the right of the use of said alley in common with other owners of adjoining lots, for the sum of three hundred and five dollars. The north half of lot No. eight on State street, in the city of New Albany, being twenty-five feet in front on said street, extending back therefrom the same width one hundred and twenty feet, with the three-story brick store and warehouse covering the same, for the sum of three thousand five hundred dollars. A tract of land in the city of New Albany, part of the northwest quarter of fractional section No. ten in three south, of range six east, marked letter "C" on plat No. fifteen and on the city map, containing seventeen acres, for the sum of one thousand six hundred and sixty-six dollars. Lot No. twenty-three on Poplar street, in plat No. twenty, of the city of New Albany,
148 for twenty-five dollars; lot No. twenty-four on said street, in said plat, for twenty-two dollars; lot No. thirty on Elm street, in plat No. twenty, of the city of New Albany, for twenty-three dollars; lot No. thirty-one on said street, in said plat, for twenty-seven $\frac{50}{100}$ dollars; lots Nos. thirty-two, thirty-three, thirty-four, thirty-five, and thirty-six on said street, in said plat, for the sum of twenty-seven dollars each; and lot No. thirty-seven on said street, in said plat, for the sum of thirty dollars. Lot No. twenty-five on Shipping street, in plat No. twenty of the city of New Albany, for the sum of twenty-one dollars; and lot No. twenty-six in the same plat, on the same street, for twenty-six dollars. All those parts of lots with the appurtenances, being twenty-six feet in front off the eastwardly side of lot No. thirty-nine on Lower High street, in the city of New Albany, and thirteen feet off the westwardly side of lot No. thirty-seven on the same street, both parts of lots making

thirty-nine feet in front on said Lower High street, extending back the same width ninety feet, having thereon two brick dwelling-houses, for the sum of one thousand and ninety dollars. A tract of land in the city of New Albany, being the north half of that part of the northwest quarter of section thirty-four, in town. two south, of range six east, lying west of the Vincennes plank-road, (except one $\frac{33}{100}$ acres deeded to George Lyman,) containing eighty acres, more or less, for the sum of eight thousand dollars. A tract of land in the city of New Al-
149 bany, being all that part of letter "H" in No. forty-two of the Illinois grant, which, beginning at a stake on the east side of Vincennes street, in plat No. sixty-three, four hundred and fifty feet north from the north line of Beeler street; runs thence north 40° west 480 feet to the line of what is called Beach farm, (letter "C;") thence north 50° east 1,419 feet to a small beach tree in the southeastern corner of said Beach farm; thence south 40° east 480 feet to a stake; thence south 50° W. 1,419 feet to the place of beginning, containing fifteen $\frac{63}{100}$ acres, for the sum of three thousand five hundred and ninety-four $\frac{90}{100}$ dollars. The undivided one-third part of that out-lot in the city of New Albany known as lot No. fifteen, in the northwest quarter of section No. thirty-four in town. two S., range six east, containing nineteen $\frac{56}{100}$ acres, for the sum of nine hundred and twelve $\frac{80}{100}$ dollars. The north half of lot No. twenty-seven on Upper First street, in the city of New Albany, being twenty-five feet in front on said street, and extending back same width one hundred and twenty feet, for five hundred dollars. The north half of lot No. two, on State street, in the city of New Albany, being twenty-five feet in front on said street, and extending back therefrom same width one hundred and twenty feet, for the sum of six hundred dollars. And all those lots in the city of New Albany comprised in all of lot No. one in Clark and Elderkin's plat, of part of letter "E"
150 in No. 28 of the Illinois grant, that part of letter "D" in Lindsley and Day's east plat, and that part of lot letter "H" and others in Day's plat of Providence, and that part of letter "D" in No. 28, Illinois grant, which are thus discribed: Beginning on the north line of the New Albany and Jeffersonville plank-road, at the west line of the Chambers' tract, and running thence westward on the line of the said plank-road sixteen feet, more or less, to the eastern produced line of East street in Lindsley and Day's east plat, when said shall be opened, sixty feet wide; thence running north 50° west with said produced line of East street sixty feet wide five hundred and fifty nine feet, more or less; thence north 50° east sixteen feet, more or less, to the northwest corner of said lot No. one; thence south 40° east with the line of the Chambers' tract five hundred and sixty-three feet, more or less, to the place of beginning; and also all the rights and interests held by the New Albany and Sandusky City Junction Railroad Company in and to thirty feet of ground by five hundred and fifty-nine feet in length adjoining the land last above discribed, which is to form the half of said East street, for the sum of one thousand two hundred and thirty dollars. All of the several lots or parcels of land above discribed were sold as aforesaid, for the several sums aforesaid, to Michael C. Kerr and Victor A. Pepin, trustees, to hold said premises, according to the terms of conveyance made to them by the undersigned, in trust for
151 John Phelps Putnam, Sarah Coit Day, Samuel J. Andrews, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Charles Arther Ely, Herman Ely, A. H. Mass, Thomas L. Smith, Samuel H. Patterson, John S. Davis, William M. Wier, William B. Lent, Victor A. Pepin, Charles B. Applegate, James Montgomery, and

Walter Mann; the said several sums bid as aforesaid being the highest and best bids made for each of said lots or parcels of land respectively.

The undersigned also sold as aforesaid, at the time and place aforesaid, the west half of the southeast quarter of section No. six, town. three south, of range six east, in the county of Floyd, State of Indiana, to Peter Vernia, for the sum of three hundred and sixty-eight dollars, that being the highest and best bid therefor. Also, the undersigned sold as aforesaid, at the time and place aforesaid, a tract of land beginning at a stake in the east corner of the land of Samuel Wilcox, deceased, at the southeast corner of lot No. three on the map of the city of New Albany, and bounded by a line running thence south 49° west one hundred and eighty-nine feet; thence north 41½° west three hundred and seventy-three $\frac{56}{100}$ feet to the center of the Silver Creek road; thence along said road southwardly two hundred and six $\frac{58}{100}$ feet; thence south 41½° degrees east two hundred and ninety-seven feet to the place of beginning, containing one and a half acres, to John M. Leib, for the sum of ninety-one dollars, that being the highest and best bid therefor. Also, the undersigned sold as aforesaid, at the time and
152 place aforesaid, a tract of land in Floyd County, Ind'a, near the city of New Albany, known as a part of the east half of the southeast quarter of section thirty-three, in town. two south, of range six east, bounded by a line beginning on the Boiling Spring road on the line between Gaudy and Thomas Sinex, running thence with said line to the line of John P. Frank's land; thence westwardly along said line to the line of William Drysdale's land; thence southwardly along said line till it strikes the line of land heretofore conveyed by Gaudy to Wright; thence eastwardly along said eastern line to the line of the Boiling Spring road; thence along said road ten feet to the place of begining, containing thirty acres, more or less, to David H. Cadwalader, for the sum of five hundred and forty dollars, that being the highest and best bid made therefor. Also, the undersigned sold as aforesaid, at the time and place aforesaid, lot No. twenty-one on Poplar street, in plat No. twenty, for fifty dollars; lot No. twenty-two on the same street, in the same plat, for twenty-six $\frac{50}{100}$ dollars, to William B. Swift, he being the highest and best bidder therefor, each lot respectively. Also, the undersigned sold as aforesaid, at the same time and place as aforesaid, to Samuel J. Kelly, lot No. seventeen on Poplar street, in plat No. twenty of the city of New Albany, for fifty-seven dollars; lot No. eighteen on the same street, in the same plat, for fifty-one dollars; lot No. nineteen on the same street, in the same plat, for fifty dollars; lot No. twenty on
the same street, in the same plat, for fifty-one dollars—the said
153 several sums being the highest and best bids made for each of the said lots respectively. Also, the undersigned sold as aforesaid, at the time and place aforesaid, lot No. seven, in Shipping street, in plat No. twenty, in the city of New Albany, to George H. Graves, for the sum of thirty dollars; and also lot No. twenty-eight on the same street, in the same plat, for twenty-four $\frac{50}{100}$ dollars—the said several sums being the highest and best bids offered for each of said lots respectively. Also, the undersigned sold as aforesaid, at the time and place aforesaid, lot No. twenty-nine on Shipping street, in plat No. twenty of the city of New Albany, to James Lucas, for thirty-one $\frac{50}{100}$ dollars, that being the highest and best bid made therefor.

All the purchasers at said sale, except the said Michael C. Kerr and Victor A. Pepin, have complied in all respects with the terms of the order of this honorable court under which said sale was made; and the

undersigned, as commissioner of this court, has made to each of said purchasers a deed of conveyance of the premises by him purchased as aforesaid. Said deeds and moneys, notes and mortgages, received from said purchasers are herewith returned to this honorable court for examination and approval.

The said Michael C. Kerr and Victor A. Pepin bid in the several lots and parcels of land by them purchased as aforesaid, as trustees in trust as aforesaid, for all and each of the persons who are beneficially interested in the judgment and decree of this honorable court, under which
154 judgment and decree this sale was made as aforesaid. The said sales, made as aforesaid to the said Kerr and Pepin as aforesaid, amount in the aggregate to the sum of thirty-one thousand seven hundred and eight $\frac{08}{100}$ dollars.

And the said persons so beneficially interested in said judgment and decree, having agreed to take the real estate purchased by the said Kerr and Pepin at the prices aforesaid, as so much cash upon said judgment and decree, I have not taken from the said Kerr and Pepin any note or mortgage on account of said purchase. I have executed to the said Kerr and Pepin, as such trustees aforesaid, a deed for the several lots and parcels of land by them purchased as aforesaid.

I herewith report all the costs and charges incident to and growing out of said sale:

Charles Frederick, commissions	$250 00
Same for advertising, drafting deeds, notes, mortgages, &c.	$60 00
Norman, Harrison & Matthews, printers	$168 50
M. Gregg & Sons, printer's fees	$148 50
	$627 00

CHARLES FREDERICK,
Commissioner.

Subscribed and sworn to before me May 15th, 1858.
S. P. TOWN, *Clerk.*

And the court, being fully advised in the premises, does now in all things fully approve and confirm said report.

155 It is further ordered by the court that said commissioner be allowed the sum of two hundred and fifty dollars as commissions for his services herein, and the further sum of sixty dollars for advertising, drafting deeds, notes, mortgages, &c.; and that Norman, Harrison & Mathews be allowed the sum of one hundred and sixty-eight dollars and fifty cents for printing, &c., and M. Gregg and Sons the sum of one hundred and forty-eight dollars and fifty cents for printing, &c., herein; all said allowances to be taxed and paid as costs herein.

It appearing to the court that the entire proceeds of the sale of said mortgaged premises, after deducting all costs, are wholly insufficient to pay the several judgments herein, and that there still remains a proportionate part of each of the judgments rendered herein at the last term of this court, amounting in the aggregate to the sum of eighty-five thousand three hundred and nineteen dollars, ($85,319.) each of said several judgment plaintiffs herein being entitled to recover of said deficiency an amount proportionate to the relative amount of his separate judgment, it is now, therefore, further ordered by the court that the said judgment plaintiffs have further execution herein against the

said railroad company, to make said deficiency by levy and sale of any other property of said company subject to execution, to be executed without relief from valuation or appraisement laws.

And afterwards, to wit, at the said April term of the said Floyd
156 circuit court on the 25th day of May, 1858:

Come now Thomas L. Smith, John Phelps Putnam, Sarah Coit Day, Samuel J. Andrews, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Charles Arthur Ely, Herman Ely, and A. H. Moss, by Smith and Kerr, their attorneys, and in open court file their several bonds on which judgment and foreclosure have been heretofore had herein, numbered as follows, to wit, Nos. 14, 15, 16, 17, 18, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 50, 51, 52, 53, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, being each for the sum of $1,000, making in all 58 bonds with coupons thereto attached: It is now, therefore, ordered by the court that the clerk of this court file said several bonds and preserve the same in his office safely.

The bonds mentioned in the foregoing order read in the words and figures following, to wit:

No. 14. *United States of America, State of Indiana.* $1,000.

One thousand dollars. The New Albany and Sandusky City Junction Railroad Company acknowledges that it owes upon the sale of this bond one thousand dollars, which sum said company promises to pay to John P. Yelverton or bearer, at the People's Bank, in the city of New York, on the first day of January, one thousand eight hundred and sixty-five, and all interest thereon at the rate of seven per centum
157 per annum, semi-annually on the first days of July and January in each year from the date thereof, on the presentation of the annexed interest warrants at the said bank until the said principal sum shall be paid.

And said company also agrees that the holder of this bond shall have the privilege of converting it into twenty shares of fifty dollars each of the capital stock of said company, upon delivering it with the unpaid coupons to the secretary at the office of said company, in exchange for such stock at any time within five years of the date hereof. And said company also agrees that all rights and benefits arising hereupon may be transfered by general or special endorsement, or by delivery, as if the same was a note of hand payable to bearer, and hereby waives all benefit from valuation or appraisment laws.

In testimony whereof the said company has [has] caused its corporate seal to be hereto attached and these presents to be subscribed to by its president and countersigned by its secretary this twentieth day of September, one thousand eight hundred and fifty-four.

[SEAL.] J. MONTGOMERY, *Pres.*

Countersigned: THO'S L. SMITH, *Secretary.*

The undersigned trustees hereby certify that the New Albany and Sandusky City Junction Railroad Company has conveyed to us,
158 by deed bearing date the twentieth day of September, 1854, the real estate discribed in a schedule accompanying the same in trust, for the use and benefit of the holders of the above bond, and one hundred and nine others, of similar tenor, effect, and amount, with power

to sell said lands on default of payment of said bonds or interest warrants, or either of them, and pay the same out of the proceeds of said real estate, which is situated in the State of Indiana; was taken by said company for stock; and has been appraised to be of the value of one hundred and fifty-four thousand eight hundred & fifty-five dollars, as by reference to said deed of trust, which has been duly recorded in the counties where said lands are situated, [as] will more fully and at large appear.

Dated at New York, September 30th, 1854.

WILLIAM G. PEARSON, JR.,
HARVEY SEYMOUR, *Trustees.*

$35. *Interest warrant.* No. 20.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer at the People's Bank in the city of New York, on the first day of January, 1865, thirty-five dollars interest due on real estate bond No. 14.

THO'S L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 19.

The New Albany & Sandusky Junction Railroad Company will pay the bearer at the People's Bank in the city of New York, on the first day of July, 1864, thirty-five dollars interest due on real estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 18.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer at the People's Bank in the city of New York, on the first day of January, 1864, thirty-five dollars interest due on real estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

159 $35. *Interest warrant.* No. 17.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer at the People's Bank in the city of New York, on the first day of July, 1863, the sum of thirty-five dollars interest due on real estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 16.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer at the People's Bank in New York City, on the first day of January, 1863, thirty-five dollars interest due on real estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 15.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer at the People's Bank in the city of New York, on

the first day of July, 1862, thirty-five dollars interest due on real estate bond No. 14.

THO'S L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 14.

The New Albany and Sandusky City Junction Railroad Co. will pay the bearer at the People's Bank in New York City, on the first day of January, 1862, thirty-five dollars interest due on real estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

160 $35. *Interest warrant.* No. 13.

The New Albany and Sandusky City Junction Railroad Company will pay to the bearer at the People's Bank in New York City, on the first day of July, 1861, thirty-five dollars interest due on real estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant* No. 12.

The New Albany and Sandusky City Junction Railroad Co. will pay to the bearer at the People's Bank in New York City, on the first day of January, 1861, thirty-five dollars interest due on real estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 11.

The New Albany & Sandusky City Junction Railroad Company will pay to the bearer at the People's Bank in New York City, on the first day of July, 1860, thirty-five dollars interest due on real estate bond No. 14.

THO'S L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 10.

The New Albany and Sandusky City Junction Railroad Company will pay to the bearer at the People's Bank in the city of New York, on the first day of January, 1860, thirty-five dollars interest due on real estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 9.

The New Albany and Sandusky City Junction Railroad Co. will pay the bearer at the People's Bank in New York City, on the first day of July, 1859, the sum of thirty-five dollars interest due on real estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

161 $35. *Interest warrant.* No. 8.

The New Albany and Sandusky Junction Railroad Company will pay

the bearer at the People's Bank in New York City, on the first day of January, 1859, thirty-five dollars interest due on real estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 7.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer at the People's Bank in the city of New York, on the first day of July, 1858, thirty-five dollars interest due on real estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 6.

The New Albany & Sandusky City Junction Railroad Company will pay the bearer at the People's Bank in the city of New York, on the first of January, 1858, thirty-five dollars interest due on real estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 5.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer at the People's Bank in the city of New York, on the first day of July, 1857, thirty-five dollars interest due on real estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

(The balance of the coupons belonging to this bond were not filed therewith.)

The other bonds mentioned in the said order are similar to the above bond, excepting the numbers.

And afterward, to wit, on the 6th day of August, 1858, an
162 alias execution is issued herein in the words and figures following, to wit:

STATE OF INDIANA, *Floyd County, sct:*

I, William W. Tuley, clerk of the Floyd circuit court, hereby certify the foregoing to be a full, true, complete transcript of all proper entries made by the clerk, and all papers pertaining to the above-entitled action and on file therein as the same appear on record and on file in our office.

Witness my hand and seal of said court, affixed at New Albany this 15th day of January, A. D. 1869.

W. W. TULEY, *Clerk.*

163 An ordinance authorizing the subscription of stock and the issue of bonds in and to the New Albany and Sandusky City Junction Railroad Company.

(Passed November 18, 1853.)

Section 1. Preamble and orders subscription for $400,000 to be paid for in bonds, &c.

2. Mayor to issue bonds attested by clerk.

3. Council shall levy tax for interest and sinking fund.

4. Tax entered in separate column and certificate issued therefor.

5. Stock to be transferred to holder of certificate.

6. Agreement to be first made: 1. That such transfers by city shall be recognized by company. 2. The company to pay in stock the interest paid by city for first three years. 3. So soon as company accept, agreement to be binding.

7. In force from and after its passage.

Preamble. Whereas three-fourths of the legal voters of the city of New Albany have petitioned the common council of said city to subscribe for stock to the amount not exceeding six hundred thousand dollars in the New Albany and Sandusky City Junction Railroad Company,
164 or in the Fort Wayne and Southern Railroad Company, incorporated to construct a railroad from New Albany to the State line of Ohio, making such subscription to the one or other of said companies in such manner or proportions as shall be deemed most for the interest of said city, and to provide for the payment of the debt thus contracted in the manner provided by law: Therefore,

Subscription of $400,000 ordered payable in city bonds. SECTION 1. *It is ordained by the common council of the city of New Albany*, That Joseph A. Moffett, the mayor of said city, be authorized and directed to subscribe in the name and behalf of said city eight thousand (8,000) shares of the capital stock of the New Albany and Sandusky City Junction Railroad Company, amounting to the sum of four hundred dollars, to be paid for in the bonds of said city of not less than one hundred dollars each, upon the call of said company, said bonds being payable in not less than ten nor more than twenty years after their respective dates, and bearing interest at the rate of six per centum per annum, and both principal and interest payable in the city of New York.

Bonds issued.
165 SECTION 2. The mayor of said city of New Albany shall issue said bonds, with coupons for the interest, payable as aforesaid upon the call of said company, and deliver the same on the reception of the same amount of certificates of stock of said company as they may from time to time receive the city bonds; and the said mayor is hereby authorized to sign the corporate name of said city to the bonds so issued by him, and attach thereto the seal of said city, which shall be attested by the city clerk, and for the payment of the interest and the final redemption of said bonds the faith of said city is hereby pledged.

Levy of tax. SECTION 3. The common council shall, from year to year, levy a tax sufficient to pay the annual interest on the debt hereby created, with an addition of not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof.

Issue of certificates. SECTION 4. In preparing the tax duplicate for each year, the city clerk shall place the taxes levied under the last preceding section in a seperate column, to be styled "tax for railroad purposes," and for all payments of such taxes the city
166 treasurer shall issue to the person paying the same a certificate, showing the amount of tax thus paid by such person, which certificate shall be assignable by endorsement.

Stock transfered for certificates. SECTION 5. Whenever an amount of such certificates, equal to one share of the capital stock of said company, or more, at its par value, shall be presented to the mayor of said city, he shall transfer to the holder of such certificates such number of shares of such stock owned by said city as said certificates may amount to, and, if there should be a fraction over the proper

amount, the said mayor shall issue to the holder a certificate for such fraction, which certificate shall be assignable in the same manner, and entitle the holder to the same rights, as the certificates issued by the city treasurer.

Agreement between company and city.

SECTION 6. Before the subscription of said stock and the delivery of said bonds, the following agreement, irrevocable except by the consent of both parties thereto, shall be entered into by the city of New Albany, and the New Albany and Sandusky City Junction Railroad Company:

1. That all shares of stock transfered by said city in accord-
167 ance with the provisions of the fourth and fifth sections of this ordinance shall be held and recognized by said railroad company as good and valid stock fully paid for.

2. The New Albany and Sandusky City Junction Railroad Company shall pay to the city of New Albany, in stock of said company, an amount thereof equal, at its par value, to the amount of interest on the bonds of said city, issued under the provisions of this ordinance for the first three years after the date thereof, deducting therefrom any dividends that may be paid by the said railroad company to said city. The stock thus paid by said railroad company to be issued at such times as the said interest may become due.

3. So soon as the board of directors of said New Albany and Sandusky City Junction Railroad Company shall accept of the foregoing agreement, and pass a by-law irrevocable to sustain the same, it shall be a contract to all intents and purposes, to be rescinded only in whole or in part by the consent of the contracting parties.

SEC. 7. This ordinance is to be in force from and after its passage.

168 *Subscription of stock to the New Albany and Sandusky City Junction Railroad Company.*

[Copy.]

Preamble.

Whereas an ordinance was passed by the mayor and common council of the city of New Albany on the 18th of November, 1853, by the 1st section of which the mayor of said city was authorized to subscribe in the name and on the behalf of said city for eight thousand shares of the capital stock of the New Albany and Sandusky City Junction Railroad Company, amounting to four hundred thousand dollars, to be paid for, in the bonds of said city of not less than one hundred dollars each, upon the call of said company:

Subscription of stock.

Now, therefore, I, Joseph A. Moffett, mayor of said city, do hereby, by virtue of the authority given me as aforesaid, subscribe for 8,000 shares of the stock of said railroad company, in the name and on behalf of said city of New Albany, to be paid for as above provided by said ordinance.

In testimony whereof I have hereunto subscribed my name as mayor of said city, and caused the seal of said city to be hereto affixed by the clerk, this 19th of November, 1853.

J. A. MOFFETT, *Mayor.*

Attest: E. SABIN, *City Clerk.*

169 An act to enable cities which have subscribed for stocks in companies incorporated to construct works of public utility, under the 56th section of the general act for the incorporation of cities, and to ratify the same.

An act to allow ratification.

(Approved February 21st, 1855.)

Section 1 allows cities to ratify subscriptions for stock previously made.

Section 2, an emergency.

Certain acts declared valid.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana*, That the common council of any city which has contracted obligations or liabilities by subscribing for the stock of any company incorporated for the construction of any railroad or other work of public utility to such city, upon the written petition of three-fourths of the legal voters thereof, under the provisions of the 56th section of the general act for the incorporation of cities, upon the supposition it was authorized to do so by said section, may, at any time after the passage of this act, ratify and affirm such subscription; and upon such ratification such subscription, and the obligations and liabilities, and the corporate bonds or obligations issued or to be issued therefor by such city, shall be valid.

170 SECTION 2. That inasmuch as contracts have been entered into by cities which it is desirable should be ratified or disaffirmed without delay, it is declared that an emergency exists in this case, and this act shall take effect from and after its passage.

Emergency.

Ratification.

An ordinance to ratify and affirm a subscription of eight thousand dollars to the capital stock of the New Albany and Sandusky City Junction Railroad Company by the city of New Albany, made on the 19th day of November, 1853, by the mayor of said city, pursuant to an ordinance of the common council thereof, passed on the 18th day of November, 1853, entitled "An ordinance authorizing the subscription of stock and the issue of bonds in and to the New Albany and Sandusky City Junction Railroad Company."

(Passed March 7, 1855.)

Section 1. Preamble and ratifies subscription.

Section 2. In force from passage.

Be it ordained by the common council of the city of New Albany:

Preamble.

SECTION 1. That whereas Joseph A. Moffett, mayor of said city, did, on the 19th day of November, 1853, in the

171 name and on the behalf of said city, and pursuant to the provisions of an ordinance of the common council of said city, passed on the 18th day of November, 1853, subscribe for eight thousand shares of the capital stock of the New Albany and Sandusky City Junction Railroad Company; and whereas said ordinance was passed and said subscription made upon the written petition of more than three-fourths of the legal voters of said city, under the provisions of the fifty-sixths section of the general act for the incorporation of cities, contained in the revised statutes of this State, and upon the supposition that this common council was authorized by said section to pass said ordinance and cause said subscription to be made, the said road of said company being deemed a work of public utility to said city; and whereas an order has been passed by the board of directors of said company and communicated to this council, to the effect that if said subscription be now ratified and affirmed by virtue of the provisions of an act of the general assembly of this State, entitled "An act to enable cities which

172 have subscribed for stock in companies incorporated to construct works of public utility, under the 56th section of the general act for the incorporation of cities, to ratify the same," approved February

21st, 1855, the calls for the payment of the instalments on said stock shall not exceed $250,000 until the road shall have been completed and put in running order at least to its junction with the Ohio and Mississippi railroad, and the remaining instalments shall only be called for and used for the purpose of furnishing the road with rolling-stock, depots, and the necessary machinery and appliances for running said road, or said portion of it; and that said order shall be irrevocable if said subscription be ratified: Therefore,

Subscription ratified.

It is hereby ordained, That said subscription made by Joseph A. Moffett for eight thousand shares of the capital stock of said company, in the name and on the behalf of the city, be, and the same is hereby, now ratified and affirmed, and all the provisions of said ordinance, by virtue of which said subscription was made, shall remain in full force.

173 SEC. 2. This ordinance shall take effect and be in force from and after its passage.

This ordinance objected to as evidence by the defendants, for the reason that it is incompetent and irrelevant under the issue joined. Objection overruled by the court and exception taken by the defendants. And it is agreed that said exception shall be stated in the record without a bill of exceptions.

Here follows an execution issued out of the Floyd circuit court, with the return thereto:

174 The State of Indiana to the sheriff of Floyd county, greeting:

Whereas on the 14 day of November, 1857, sundry persons recorded judgments in the Floyd County circuit court against the New Albany and Sandusky City Junction Railroad Company for sundry sums, in all amounting to one hundred and nineteen thousand eight hundred and seventy dollars, to wit, William S. Pearson, jr., and Harvey Seymour, trustees, &c., $54,855; Victor A. Pepin, $18,295; Walter Mann and Samuel H. Patterson, each, $1,035; John S. Davis, Charles B. Applegate, each, $7,050; Thomas L. Smith, John S. McDonald, William M. Weir, and William B. Lent, each, $5,875, together with their costs in said action expended, and Charles Fredrick, esq., was appointed by said court a commissioner to sell certain real estate which by the order of said court was directed to be sold to satisfy said judgments, costs, &c.; and afterwards, to wit, at April term, 1858, of said court, said commissioner made

175 report to said court that, after advertising and selling the real estate ordered by the court to be sold by him, [that] there still remains unpaid a proportionate part of each of the judgments hendered herein at the last term of this court, amounting in the aggregate to the sum of eighty-five thousand three hundred and nineteen dollars, ($85,319,) each of the said several judgment plaintiffs herein being entitled to recover of said deficiency an amount proportionate to the relative amount of his seperate judgment: It is now, therefore, ordered by the court that the said judgment plaintiffs have further execution herein against said railroad company to make said deficiency by levy and sale of any other property of said company subject to execution, to be executed without any other relief from valuation or appraisement laws.

You are therefore commanded to levy said sum so reported deficient as aforesaid, with interest to this date, amounting to the sum of eighty-six thousand three hundred and fifty-seven $\frac{04}{100}$ dollars, of the property of the said New Albany and Sandusky City Junction Railroad Com-

pany in your county, subject to execution, and have the money
176 at the clerk's office, to satisfy said judgment, interest, and costs accrued, and return this writ in one hundred and eighty days, with your doings thereon.

Witness Salem P. Town, clerk of said court, and the seal thereof hereto affixed, this 6th day of August, 1858.

[L. S.] SALEM P. TOWN, *Clerk.*

By virtue of the within execution I have this day levied upon that part of lots Nos. 6 & 8 on Upper Elm street, in the city of New Albany, Indiana, beginning at the northeast corner of said lot No. 8, on Upper First street, and running thence southward on said street 40 feet, and extending back the same width 120 feet, subject to the rights of the lessees now on the ground, to hold the same unto her and her representatives and assigns forever, &c., taken as the property of said defendants this 9th day of October, 1858.

CHARLES FREDRICK, *S. F. C.*

And after advertising the time and place of sale in the manner prescribed by law, I did, by virtue of this execution, between the hours of 10 o'clock a. m. and 4 o'clock p. m., of the 3d day of November, 1858, at the court-house door of said Floyd County, after first offering,
177 according to law, the rents and profits of the premises levied on as aforesaid for a term of years, not exceeding seven, and receiving no bid therefor, then and there offer and sell at public auction the said premises in fee-simple to John E. Noys and Michael Clynes, for the sum of fifteen dollars, that being the highest and best bid made therefor; and I have made said John E. Noys and Michael Clynes a deed for said premises, and I have applied said sum of fifteen dollars to the payment in part of the costs of sale and other costs herein. And this writ being still unsatisfied, I have made carefull search and diligent inquiry for other property of the within-named New Albany and Sandusky City Junction Railroad Company in Floyd County, and, finding none, I now return this execution unsatisfied, no property of the defendant being found in my county out of which the said sums of money, in said writ mentioned, or any part thereof, can be made.

December 1st, 1858.

CHARLES FREDRICK, *S. F. C.*

178 And here follows the endorsements on said execution:

File 7273, writ 4254. Returnable in 180 days. Victor A. Pepin vrs. N. A. and S. C. J. R. R. Co. et al. Judgment May 24, 1858. Repleviable. Atto and Davis, attorneys. Judgment, $85,319. Costs, $1,666 45. Interest from May 24, 1858. Without relief from valuation or appraisement laws. Came to hand August 11, 1858, at 10 o'clock a. m. C. Fredrick, S. F. C.

STATE OF INDIANA, *Floyd County, sct:*

I, William W. Tuley, clerk of the Floyd circuit court, hereby certify the foregoing to be a full, true, and complete copy of the original writ, and return thereon, as the same appears of record and on file in our office, with all its endorsements.

Witness my hand and the seal of said court affixed at New Albany this 20th day of January, 1869.

[SEAL.] W. W. TULEY, *Clerk.*

179 Here follow certain proceeding, extracted from the records of the common council of the city of New Albany:

STATE OF INDIANA,
Floyd County, City of New Albany, set:

At a regular meeting of the common council of the city of New Albany, county of Floyd, and State of Indiana, at the council chamber, on Monday evening, March 5th, 1855, among others were the following proceedings:

Mr. Bradly, from the ordinance committee, reported "An ordinance to ratify and affirm a subscription of eight thousand shares to the capital stock of the New Albany and Sandusky Junction Railroad Company by the city of New Albany," made on the 19th day of November,
180 1853, by the mayor of said city, in pursuance of an ordinance of the common council thereof, passed on the 18th day of November, 1853, entitled "An ordinance authorizing the subscription of stock and the issue of bonds in and to the New Albany and Sandusky City Junction Railroad Company," and moved that the same be made the special order for the next Wednesday night.

Mr. Stoy moved to amend by making it the special order for the first regular meeting in April.

Mr. Bradly moved to lay Mr. Stoy's amendment on the table, which was carried; and the question then recurring on Mr. Bradley's original motion, it was carried, and the ordinance declared the special order for next Wednesday evening.

Mr. Weir moved that Mr. Stoy have permission to present a remonstrance and certain other papers. Carried. And the remonstrance was received and read.

And Mr. Sandford moved that the same be referred to a select committee of 5, to be appointed by the president. Mr. Weir moved to amend by asking that the said committee also examine and consider the original petition asking for the city's subscription, as handed into the council August 27th, 1853; which was accepted, and Mr. Sand-
181 ford's motion, with the amendment, was carried. Whereupon the president named Messrs. Sandford, Weir, Stoy, Peirce, and Bradly as the committee.

The papers accompanying the remonstrance, viz, the proceedings of a meeting of citizens held at the court-house on Saturday night last, were read, and, on motion, referred to the same select committee.

(See pages 144, 145, journal of proceedings No. 5.)

At an adjourned meeting of the common council, held on Wednesday March 7th, 1855, among others were the following proceedings:

The select committee appointed by his honor at the last meeting reported as follows:

"Mr. PRESIDENT: The committee to whom was referred the remonstrance of certain citizens of New Albany against ratifying the subscription of the city to the New Albany and Sandusky City Junction Railroad Company, together with the proceedings of a public meeting upon the same subject, and the original petitions upon which such subscription was made, respectfully beg leave to report:

"That said city did on the 18th day of November, 1853, upon the petition of more than three-forths of the legal voters, make a sub-
182 scription for 8,000 shares of the stock of said railroad company, amounting to $4,000,000; that at the time said subscription was

made the enterprise was regarded as one of immense importance to the interest and prosperity of the city; it was made with the approbation of a very large majority of the tax-payers. It also appears that, when it was ascertained that the subscription of the city could not be made available, the company was thrown into a state of great embarrassment, and appeals were made to our citizens for additional aid by way of individual subscriptions, to enable it to put the road under contract; but there seems to have been no assurance by the company or by the city council that the city subscription was considered as abandoned. By the aid of such individual subscriptions the whole line of road was put under contract upon favorable terms, and several miles of the grading has been nearly finished. Something more than a year ago the company entered into a contract with the Mad River and Lake Erie and the Sandusky and Louisville Railroad Company, by which the latter agree, upon certain conditions, to guarantee the bonds of said company to the
183 amount of ten thousand ($10,000) per mile of road. This guarantee will amount to more than $1,000,000, and has always been considered of very great importance as an aid to the New Albaay company. One of the conditions upon which it was to be made was that the company should first procure a good subscription list to the amount of $700,000. It appears that the whole subscription list of the company, including real estate and excepting the subscription of the city, amount to only $353,000. The committee are informed by the company that without the aid of the city subscription they have no hope of procuring such an amount as will entitle them to the guarantee of the other companies, and some of the committee have had an interview with Mr. Howard, the principal contractor for the construction of the road, and have been unequivocally informed by him that, if the city should repudiate the subscription made, the credit of the road would be so entirely destroyed that it will be impossible to construct it, and he shall request the company to rescind his contract, and to show no ob-
184 stacle in the way of terminating the road at some other point on the Ohio River. He states, however, that as to the real estate which has been subscribed and about which much complaint has been made, he is willing to take it all at the price subscribed in place of the same amount of stock which he is to receive pursuant to the terms of his contract. The committee are therefore constrained to believe that unless this subscription is ratified the terminus of this important road will certainly be lost to this city; but, as the subject referred were accompanied by no instructions, they desire simply to report the facts so far as they have been able to ascertain them, that the council may take such action as may be deemed expedient.

"STEWART SANDFORD,
"AUGUST BRADLEY,
"W. M. WEIR,
"JAMES PEIRCE,
"*Comt.*

"To the MAYOR and COUNCIL *of New Albany.*"

Mr. Bradley moved that the report be received and concurred in by the council.

The ayes and noes being demanded, the motion was carried by
185 the following vote: Ayes, Bradley, Bushnell, Kent, Knapp, Peirce, Sandford, and Weir—7 votes. Noes, Stoy, St. John, Townsand, and Wilson—4 votes.

(See journal of proceedings No. 5, pages 148, 149, and 150.)

At a regular meeting of the common council, held on Tuesday, October 2d, 1855, among others were the following proceedings:

Mr. Tounsand moved that a committee be appointed of three to vote the stock of the city for the directory of the New Albany and Sandusky City Junction [Junction] R. R. Co. at the approaching election. A ballott being called resulted as follows: the election of Messrs. Crane, Pierce, and Tounsand, committee.

(See journal of proceedings No. 5, page 286, 287.)

At a called meeting of the common council, held on October 26th' 1855, among others were the following proceedings:

Mr. Tounsand moved that there be a committee of two, to consist of Messrs. Crane and Wilcox, to confer with Captain James Montgomery, the president of the N. A. and S. C. J. R. R. Co., and ascertain the amount of new stock subscribed, and by whom, and a full report of the late election held for a directory for said company. Carried.

(See journal of proceedings No. 5, page 298.)

186 At a regular meeting of the common council, held on Tuesday evening, April 5th, 1856, among others were the following proceedings:

Mr. Crane, from select committee, made the following report:

"Mr. PRESIDENT: The special committee to whom was referred the matter of an examination of the N. A. and S. C. Junction R. R. books, &c., to ascertain the amount of newly-subscribed stock, and by whom, and to make a full report of the late election held for the directory of said road, would make the following report:

"That they have examined the books and papers relative to the late election, and find that there was 21,110 votes cast at said election, and that the following-named persons recorded the number of votes opposite their names:

James Montgomery	12, 794
John S. Davis	12, 778
John S. McDonald	11, 784
T. L. Smith	12, 383
W. M. Weir	12, 784
W. B. Lent	12, 784
B. F. Deval	12, 778
J. B. Winstandly	12, 778
J. C. Moody	12, 204
John Briggs	8, 338
G. G. Carrill	8, 338
P. M. Kent	12, 456
Ja's Peirce	21, 110
J. A. Moffatt	20, 725
V. A. Pepin	20, 800
David Crane	8, 338
J. B. Anderson	8, 710
J. B. Ford	8, 666
P. M. Wilcox	16, 363
J. P. Smith	8, 338
J. K. Woodward	8, 666
Tho's Conner	8, 344

187 "Your committee find that there is stock subscribed in said company by sundry corporations and individuals to the following

amounts; that is, allowing the original subscription to the articles of associations to be three hundred dollars per name, as charged on the ledger of said company:

Cash subscriptions	86,150 00
Clark Co. plank-road	63,000 00
Real estate subscribed	283,206 00
Stock payable in work	306,590 00
City of N. Albany	400,000 00
	$1,138,946 00

"SUMMARY.

Number of shares subscribed	22,778 $\frac{46}{100}$
" " " voted	21,110
" " " not voted	1,668

"Furthermore, your committee cannot find that there has been any subscription to the stock of said company since June 5th, 1854, except the stock subscribed by the Messrs. S. and C. Howard, [which] to which I find no date, but is dated the ledger of said company, in the account of said Howard, September 5th, 1855; said subscription is to the amount of $306,590, payable in work.

"Your committee have complied with the requirements set forth in said resolution as they understand it.

"DAVID CRANE,
"P. M. WILCOX,
Committee."

188 Mr. Tounsand moved to accept the report and instruct the clerk to enter it upon the minutes, and that the same be published with the minutes. Carried.

(See journal of proceedings No. 5, pages 388, 389.)

At a regular meeting of the common council of the city of New Albany, held on Monday, September 15th, 1856, among others were the following proceedings:

Mr. Davis offered the following:

Resolved, That the mayor be, and he is hereby, instructed to cast the vote of the city for directors in the New Albany and Sandusky City Junction Railroad Company at the approaching election for directors, and that he vote for such persons as in his judgment will best promote the interests of the city and company.

The ayes and noes were taken under the rule. Affirmative, Mess. Bentley, Davis, Dorsey, Howk, Hill, Kent, Powell, Peirce, and Sandford—9.

No member voting in the negative.

(See journal of proceedings No. 5, pages 536.)

189 I, Mathew J. Huette, city clerk of the city of New Albany, Floyd County, Indiana, hereby certify that the foregoing is a true copy, as taken from the record on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said city on this the 15th day of January, 1869.

[SEAL.] MATTHEW J. HUETTE,
City Clerk.

190 Depositions of Elijah Sabin, Thomas L. Smith, and Matthew J. Huett, witnesses produced and sworn before me, a notary public in and for the county of Floyd and State of Indiana, on the 15th day of January, 1869, pursuant to the enclosed notice, said depositions being taken on the part of the complainants in an action now pending in the circuit court of the United States, district of Indiana, wherein Heman Ely et al. are complainants, and the New Albany and Sandusky Junction Railroad Company et al. are defendants.

Elijah Sabin, being duly sworn, on oath deposes and says:

1. Question by the complainant. State your name, age, and residence.

Ans. Elijah Sabin; aged 47; New Albany, Indiana.

2d. Question by same. State whether you were ever city clerk
191 of the city of New Albany, Indiana, and, if so, when; also, how long you have resided in New Albany.

Ans. I was city clerk of the city of New Albany, Indiana, in 1852, 1853, and 1854, going out of office in the spring of 1855. I have resided in New Albany, Ind., since 1850, excepting from 1857 to 1861, during which time I resided in the country.

3d. Question by the same. State what knowledge you have, if any, as to the existence and present whereabouts of the original petition presented to the city council of New Albany to subscribe for stock in the New Albany and Sandusky City Junction Railroad Company.

Ans. During the time I was city clerk there was a petition signed and presented to city council to subscribe stock to the New Albany and Sandusky City Junction R. R. Company; said petition was among the files of city clerk's office when I returned, according to my best recollection and belief; of its present existence and whereabouts I know nothing.

4th. Question by the same. State whether you have any recollection of the number of names signed to said petition, and when and where you last saw the petition.

192 Ans. I have no recollection of the number of names on said petition; they were very numerous. The last time I saw said petition or petitions was one day during the taking of testimony in what was known as the "Pop Corn Court," in 1856 or 1857.

5th. Question by the same. State whether the circulation of said petition was open and notorious, or privately and secretly; state fully in this respect.

Ans. The circulation of said petition was open and notorious, a matter of public interest and discussion, talked of freely among the people, and the public were generally informed of the matter.

ELIJAH SABIN.

Also came Thomas L. Smith, and, being duly sworn, deposes and says:

1. Question by complainants' solicitor. State your name, age, and residence.

Ans. My name is Thomas L. Smith; my residence is in the city of New Albany, Indiana; and my age is over sixty years.

2d. Question by the same. State how long you have resided in New Albany; your occupation during said time; what city offices, if any, you have held, and what offices, if any, you held in the New Al-
193 bany and Sandusky City Railroad Company.

Ans. I have resided in New Albany since the year 1839; my occupation has been that of an attorney at law; I have never held any

city office; I was a member of the board of directors of that company for some years—I cannot remember how long; and I was also secretary of that board a part of the time.

3d. Question by the same. State whether you were attorney for the trustees Pierson and Seymour, in the case of Victor A. Pepin against the New Albany and Sandusky City Junction Railroad Company, Pierson, Seymour, and others, in the Floyd circuit court, in 1857, and whether you were attorney for the said railroad company in said case; also, whether you were attorney for Heman Ely and others, in the partition suit of Ely and others, heard in said court in 1858.

Ans. As one of the firm of Smith and Kerr, attorneys at law, I appeared for the trustees in the Pepin case and filed their answer. I was not, I think, attorney for the railroad company in that case. Our firm of Smith and Kerr appeared as attorneys for Heman Ely and
194 others, in the partition suit mentioned in the question.

4. Question by the same. State whether you were ever authorized by Heman Ely and others, holders of the real estate bonds of the said railroad company, to compromise or settle with said company, or take any real estate or other property in payment or satisfaction of such bonds or the judgment rendered thereon.

Ans. I never was authorized to make any such settlement for them, and never did. There was a written contract signed by myself, Heman Ely, and others, relative to the purchase of property under the judgment in the case of Pepin and others above mentioned, and also under another judgment in favor of Pepin against certain other parties.

5. Question by the same. Please look at the paper now shown you, marked "A" and state in whos handwriting it is, and whether it is the agreement mentioned in your last answer or a true copy thereof.

Ans. The paper marked "A" is in my handwriting, and purports to be a copy of the original agreement made by the parties whos
195 names are attached thereto. I have not now an oppertunity to compare it with the original, and I do not know where the original is, but I presume it is a true copy.

6. Question by the same. State whether you were present at the trial of the case of William Lindley vs. the above-named railroad company, Putnan, Pierson, Ely, and others, before Judge Jewett, in the circuit court of Floyd County, about a year ago, and whether you were a party and witness in said case.

Ans. I was present at the trial of that case; was a party and a witness.

7. Question by the same [by the same.] State whether you ha[ve] personal recollection in regard to the fact of compromise, settlem[ent] payment of said bonds, and judgment thereon being litigated case before said Jewett.

Ans. The original contract, of which the paper marked "[A]" copy, was in evidence in that case, and there was also evid[ence] subsequent agreement relative to the distribution of the pr[oceeds] in, or to be bid in, under the two judgments mentioned in th[e]

8th. Question by the same. State whether you have any as to the petitions filed by the citizens to subscribe for stock Albany and Sandusky City Junction R. R. Co. above named, present existance. State fully all you know about it.

Ans. I know there were such petitions, but I have no knowledge
203 at all as to their present existance, or what became of them.

9th question. State whether you ever knew or heard of any suit being brought by any resident or property owner in the city of

190 Depositions of Elijah Sabin, Thomas L. Smith, and Matthew J. Huett, witnesses produced and sworn before me, a notary public in and for the county of Floyd and State of Indiana, on the 15th day of January, 1869, pursuant to the enclosed notice, said depositions being taken on the part of the complainants in an action now pending in the circuit court of the United States, district of Indiana, wherein Heman Ely et al. are complainants, and the New Albany and Sandusky Junction Railroad Company et al. are defendants.

Elijah Sabin, being duly sworn, on oath deposes and says:

1. Question by the complainant. State your name, age, and residence.

Ans. Elijah Sabin; aged 47; New Albany, Indiana.

2d. Question by same. State whether you were ever city clerk
191 of the city of New Albany, Indiana, and, if so, when; also, how long you have resided in New Albany.

Ans. I was city clerk of the city of New Albany, Indiana, in 1852, 1853, and 1854, going out of office in the spring of 1855. I have resided in New Albany, Ind., since 1850, excepting from 1857 to 1861, during which time I resided in the country.

3d. Question by the same. State what knowledge you have, if any, as to the existence and present whereabouts of the original petition presented to the city council of New Albany to subscribe for stock in the New Albany and Sandusky City Junction Railroad Company.

Ans. During the time I was city clerk there was a petition signed and presented to city council to subscribe stock to the New Albany and Sandusky City Junction R. R. Company; said petition was among the files of city clerk's office when I returned, according to my best recollection and belief; of its present existence and whereabouts I know nothing.

4th. Question by the same. State whether you have any recollection of the number of names signed to said petition, and when and where you last saw the petition.

192 Ans. I have no recollection of the number of names on said petition; they were very numerous. The last time I saw said petition or petitions was one day during the taking of testimony in what was known as the "Pop Corn Court," in 1856 or 1857.

5th. Question by the same. State whether the circulation of said petition was open and notorious, or privately and secretly; state fully in this respect.

Ans. The circulation of said petition was open and notorious, a matter of public interest and discussion, talked of freely among the people, and the public were generally informed of the matter.

ELIJAH SABIN.

Also came Thomas L. Smith, and, being duly sworn, deposes and says:

1. Question by complainants' solicitor. State your name, age, and residence.

Ans. My name is Thomas L. Smith; my residence is in the city of New Albany, Indiana; and my age is over sixty years.

2d. Question by the same. State how long you have resided in New Albany; your occupation during said time; what city offices, if any, you have held, and what offices, if any, you held in the New Al-
193 bany and Sandusky City Railroad Company.

Ans. I have resided in New Albany since the year 1839; my occupation has been that of an attorney at law; I have never held any

city office; I was a member of the board of directors of that company for some years—I cannot remember how long; and I was also secretary of that board a part of the time.

3d. Question by the same. State whether you were attorney for the trustees Pierson and Seymour, in the case of Victor A. Pepin against the New Albany and Sandusky City Junction Railroad Company, Pierson, Seymour, and others, in the Floyd circuit court, in 1857, and whether you were attorney for the said railroad company in said case; also, whether you were attorney for Heman Ely and others, in the partition suit of Ely and others, heard in said court in 1858.

Ans. As one of the firm of Smith and Kerr, attorneys at law, I appeared for the trustees in the Pepin case and filed their answer. I was not, I think, attorney for the railroad company in that case. Our firm of Smith and Kerr appeared as attorneys for Heman Ely and
194 others, in the partition suit mentioned in the question.

4. Question by the same. State whether you were ever authorized by Heman Ely and others, holders of the real estate bonds of the said railroad company, to compromise or settle with said company, or take any real estate or other property in payment or satisfaction of such bonds or the judgment rendered thereon.

Ans. I never was authorized to make any such settlement for them, and never did. There was a written contract signed by myself, Heman Ely, and others, relative to the purchase of property under the judgment in the case of Pepin and others above mentioned, and also under another judgment in favor of Pepin against certain other parties.

5. Question by the same. Please look at the paper now shown you, marked "A" and state in whos handwriting it is, and whether it is the agreement mentioned in your last answer or a true copy thereof.

Ans. The paper marked "A" is in my handwriting, and purports to be a copy of the original agreement made by the parties whos
195 names are attached thereto. I have not now an oppertunity to compare it with the original, and I do not know where the original is, but I presume it is a true copy.

6. Question by the same. State whether you were present at the trial of the case of William Lindley vs. the above-named railroad company, Putnan, Pierson, Ely, and others, before Judge Jewett, in the circuit court of Floyd County, about a year ago, and whether you were a party and witness in said case.

Ans. I was present at the trial of that case; was a party and a witness.

7. Question by the same [by the same.] State whether you have any personal recollection in regard to the fact of compromise, settlement, or payment of said bonds, and judgment thereon being litigated in said case before said Jewett.

Ans. The original contract, of which the paper marked "A" is a copy, was in evidence in that case, and there was also evidence of a subsequent agreement relative to the distribution of the property bid in, or to be bid in, under the two judgments mentioned in that contract.

8th. Question by the same. State whether you have any knowledge as to the petitions filed by the citizens to subscribe for stock in the New Albany and Sandusky City Junction R. R. Co. above named, or of its present existance. State fully all you know about it.

Ans. I know there were such petitions, but I have no knowledge
203 at all as to their present existance, or what became of them.

9th question. State whether you ever knew or heard of any suit being brought by any resident or property owner in the city of

New Albany for the purpose of preventing or enjoining the common council of said city from subscribing for railroad stock in said railroad company, or from ratifying the same.

Ans. I never knew or heard of any.

THOMAS L. SMITH.

Here follows the paper referred to as Exhibit A by this witness:

Whereas a sale of the lots and lands mortgaged by the New Albany and Sandusky City Junction Railroad Company to Harvey Seymour and William L. Pierson, jun., esq's, to secure the payment of one hundred and ten bonds issued by said company and known as the real estate bonds of said company, was made by Charles Fredrick, esq.,
196 commissioner, the 30th of March, 1858, by virtue of a judgment and decree of the Floyd circuit court, at its last October term, at the suit of Victor A. Pepin against said railroad company and others:

And whereas it was deemed advisable by the undersigned parties entitled to the benefit of said judgment and decree to prevent the undue sacrifice of said property that Victor A. Pepin and Michael E. Kerr should bid off such parcels of said property as should not be sold at an adequate price to others, for the benefit of all the parties hereto, with a view to enable them to realize, if possible, the amounts of their several claims by a subsequent sale of such property, and said Pepin and Kerr did, accordingly, bid off a large quantity of said lots and lands:

And whereas said sale by said commissioner did not produce a sufficient amount to satisfy the judgments of the undersigned parties, and there is other properties of the said railroad company which may be levied upon to satisfy their said judgment and decree, a part of which has been mortgaged by said railroad company to John S. McDonald, Charles B. Applegate, John S. Davis, William B. Lent, Victor A. Pepin, William M. Weir, James Montgomery, and Thomas L. Smith,
197 further to secure them in the payment of five bonds filed by each of them in the suit in which said judgment and decree was rendered, and suit has been brought by them to foreclose said mortgage, with a view to the settlement of all questions that may arise relative to the rights of the parties hereto:

It is agreed:

1st. That all of said property so bid off shall be conveyed by the commissioners making such sale to the said Victor A. Pepin and Michael C. Kerr in trust for the use and benefit of said several parties.

2d. That such conveyance shall contain a power to said Pepin and Kerr to sell and convey any and all of said lots and lands, or any part thereof, at public or private sale, for the benefit of the undersigned parties, at such prices and upon such terms as to the time and mode of payment and the giving security for payment as they may deem expedient.

3d. That at any future sales of any property under the judgment and decree already rendered, or under any judgment to be obtained in the forclosur suit now pending, the saide Pepin and Kerr shall purchase and hold for the benefit of the undersigned parties all property not bid off at reasonable prices by other persons, in the same manner
198 and for the same purposes as at the sale already made.

4th. That the proceeds of all sales already made to other persons, as well as of all sales hereafter to be made under said judgment and decree, or any judgment or decree in said foreclosure suit now pending, shall be paid by the commissioner or sheriff making the sale to said Pepin and Kerr, to be collected and applied by them as herein provided.

5. The proceeds of the sales made by said Pepin and Kerr, and all other money received or collected by them under this agreement, shall, as soon as received, be applied as follows: 1st. To the payment of all costs of suit and expenses of sale. 2d. To the payment of any taxes or other charges which are liens on said property, or any of it. 3d. To the payment to William Pierson, jun., and Harvey Seymour, the trustees mentioned in said mortgage of said railroad company, five hundred dollars each for services as such trustees, and one hundred and fifty dollars each for their expenses incurred in the discharge of their trust, with interest upon said sums from the date of the decree until paid. 4th. To the payment of all the claims of the parties hereto entitled to the benefit of said judgment and decree, pro rata, with the following
199 exceptions, that is to say: They shall apply all the proceeds of the sales of the property mentioned in the said mortgage, now in process of foreclosure, exclusively to the payment of the costs of that suit, and of the several debts secured by that mortgage, until the said John S. McDonald, Charles B. Applegate, John S. Davis, William B. Lent, Victor A. Pepin, William M. Weir, James Montgomery, and Thomas L. Smith shall each have received out of the proceeds of the sales of said property, together with their pro rata proportion of the proceeds of the sales of other property, the sum of two thousand and five hundred dollars, with interest from this date, which will be fifty per centum of the amount of the five bonds held by each of them, and included in said judgment and decree. And after said sum of $2,500 shall have been paid to the said parties last above mentioned, with interest as aforesaid, the whole of the proceeds of all the property, as well that covered by said mortgage now in process of foreclosure as any and all other property or receipts coming to the hands of said Pepin and Kerr as aforesaid, shall be applied exclusively to the payment of the other creditors named in said judgment and decree, pro rata, until each
200 and all of them shall have received a sum equal to fifty per centum of the face of the bonds held and filed by them respectively, with interest to the time of such payment from this date, and, after all the undersigned parties shall have thus been made equal by the receipt of fifty per centum of the face of the bonds held and filed by them, the proceeds of all sales of any and all property mentioned in this agreement shall be distributed pro rata to the several parties hereto according to the amount of the judgments severally rendered in favor of each of them.

6th. In case it should be necessary, in the opinion of said Pepin and Kerr, to raise any money for the payment of the aforesaid costs, charges, and expenses, before the same can be realized from the sale or receipts of said property, they may make a pro rata assessment according to the amounts of the several claims of the undersigned, payable upon reasonable notice, and the undersigned agree to pay such assessments.

7th. The said Pepin and Kerr shall receive five per centum on the amount of sales made by them in full compensation for all their services in making such sales, and collecting and distributing the purchase-
201 money, and they shall semi-annually make out a statement of all their accounts in the discharge of their duties and trusts for the information of any of the parties interested.

8th. In case of the death of said Pepin or Kerr, or the refusal of either or both to execute the duties of the trusts conferred upon them, any of the parties hereto, after reasonable notice shall have been given to each of the other parties, may apply to the Floyd circuit court, or the

judge thereof, in vacation, to appoint some suitable person to fill such vacancy or vacancies, and such person or persons so appointed shall perform all the duties and trusts aforesaid.

9th. The said Pepin and Kerr shall collect and receive all rents now due or to become due from any of said property and apply the same as hereinbefore provided.

10th. It is also agreed that the said Pepin and Kerr may, in their discretion, sell to any of the parties hereto any of said property, not exceeding forty per centum of the amount of the bonds originally filed by them, in liquidation of so much of their interest in said judgment and decree, and any judgment to be rendered.

In testimony whereof the said parties have hereunto set their hands this 31st day of March, 1858.

202

JOHN S. McDONALD.
SAM'L H. PATTERSON,
By J. S. DAVIS.
JOHN S. DAVIS.
WILLIAM M. WEIR.
WILLIAM B. LENT.
V. A. PEPIN.
C. B. APPLEGATE.
J. MONTGOMERY.
A. H. MOSS,
By W'M S. PIERSON.
THO'S L. SMITH.
JOHN PHELPS PUTNAM,
SARAH COIT DAY,
SAMUEL T. ANDESON,
ELIJAH DEWITT,
ROLLIN C. DEWITT,
GEORGE R. STARR,
HORACE C. STARR,
CHARLES ARTHER ELY,
By HEMAN ELY, *their Attorney.*
HEMAN ELY.

The undersigned agree to accept the trusts conferred in the foregoing instrument.

MICHAEL KERR.
V. A. PEPIN.

Matthew J. Huette, being duly sworn, deposes and says:

1. Question by the complainants' solicitor. State your residence and occupation.

Ans. My residence is New Albany, Indiana. I am city clerk of the city of New Albany. I have the city records, and books, and papers belonging thereto in my possession.

2. Question. State whether you have made search among the papers in your office to find the petition of the citizens of New Albany for the city to take stock in the New Albany and Sandusky City Railroad Company; and, if so, did you find it?

Ans. I have made reasonable search, and have failed to find them.

MATTHEW J. HUETTE,
City Clerk.

204 STATE OF INDIANA, *County of Floyd, ss:*

I, John O. Green, a notary public in and for said county and State, hereby certify that the above-named Elijah Sabin, Thomas L. Smith, and Matthew J. Huette were by me first duly sworn, according to law, to testify the truth, the whole truth, and nothing but the truth relating to said cause; that all the questions were written in my presence by S. Burke; that the answers in the depositions of said witness Elijah Sabin, written by himself in my presence, and under my direction; and that the answers in the depositions of said witnesses Thomas L. Smith and Matthew J. Huette were reduced to writing by me; that the said defendants were present by Thomas L. Smith, their attorney, during the examination of said witnesses Elijah Sabin and Matthew J. Huette, and by their attorney Robert M. Weir, esq., during the examination of said witness Thomas L. Smith; that the complainants were present during the examination by their attorney, S. Burke, esq., and said depositions were taken at the office of the clerk of the Floyd circuit court, in the city of New Albany, in the county of Floyd and State of Indiana,
205 on the 15th day of January, A. D. 1869, between the hours of 8 o'clock a. m. and 6 o'clock p. m. of said day.

In testimony whereof I have hereunto set my hand and official seal this 15th day of January, 1869.

[SEAL.] JOHN O. GREEN,
Notary Public.

206 HEMAN ELY ET AL.
v.
THE CITY OF NEW ALBANY AND OTHERS.

It is admitted and agreed by counsel and the parties to the above-entitled suit as follows:

1st. That the record of the acts and proceedings of the New Albany and Sandusky City Junction Railroad Company, marked "A," and subscribed by counsel, is the true and correct record of the acts and proceedings of said company as far as the same purport to be entered therein, and that said book may be used as evidence herein without further proof.

2d. That one hundred thousand dollars in bonds of the city of New Albany were issued and delivered to said railroad company before the alleged ratification of the subscription by said city, and one hundred thousand dollars thereafter; and that in pursuance of the adjustment and compromise made between said company and said city, as set
207 forth in the pleadings herein, one hundred and ninety-three thousand dollars of said bonds were surrendered by said company to said city for cancellation, and the remaining 7 are outstanding, and the city has paid the interest thereon.

3d. That no part or portion of said railroad was ever in fact completed by said company, but large amounts of money were expended in work on the same.

That all ordinances of the city of New Albany enacted at any time in reference to or upon the subject of its subscription aforesaid, or any adjustment or compromise thereof, or of any matter in any way arising out of or connected therewith, may be used in evidence herein, without further proof, and that they are all correctly printed and published in the book of ordinances of the city of New Albany, printed in 1857.

That the certified record now on file, with the pleadings herein, in the

case of William Lindley vs. the said railroad company and others, from the Floyd circuit court, may be used in evidence here so far as competent evidence, without any further authentication or proof; and that all records of other litigation or proceeding in said Floyd circuit court,
208 which are incorporated in and made parts or parts of the record in said Lindley case, may also be used as evidence herein, so far as competent, without any further authentication or proof; and that either party to the above-entitled action of Ely et al. vs. said city may hereafter procure and use as evidence on the trial thereof, as far as competent evidence, any record or records of any other suit or suits in said Floyd circuit, directly or indirectly affecting or relating to the subject-matter in controversy in the above-entitled suit, having any such record certified in the usual manner by the clerk of the court.

6th. That all the books of account or proceedings of said railroad company, to wit, the general ledger, stock ledger, balance ledger, liability ledger, cash book, and the two journals, may be used as evidence on the trial of said cause, without further evidence or proof of identity, as far as they are competent in law. That the records of any suits instituted by any persons in any court of Floyd County, Indiana, against said city, to restrain or enjoin the collection of any tax or taxes imposed by said city on account of or to pay interest or principal of any
209 bonds issued by said city to said railroad company, may be used as evidence, so far as legally competent on the trial of this case, without further proof or authentication than the usual certificate of the clerk of such court in which said cases or suits were instituted or prosecuted.

It is further agreed that the ordinances of the city of New Albany, relating to the subscription of stock and the final compromise made with the railroad company, were duly recorded and published immediately after the same had been passed by the city council, in accordance with the charter of the city and laws of the State requiring the publication and recording thereof.

It is further agreed that the affidavits of the several subscribers to the articles of association named in the bill of complaint in this suit, and who have filed answers, by George V. Howk and Tho's L. Smith, and by Hendricks, Hord and Hendricks, attorneys for defendants, as defendants, that they have paid the sum of $300 each upon the stock subscribed on said articles by them, and that they have paid all the other stock in said company subscribed severally by them since that date in full, and that they have severally transferred to the city
210 of New Albany all of the stock originally subscribed by them in excess of three hundred dollars, stating the time as accurately as possible of such transfer, shall be received and read on the hearing of this cause as legal and competent evidence of the facts above referred to on behalf of the defendants; the several assignments to said S. Burke, if admissible in evidence, may be offered and received without formal proof of the execution. The pl'ff does not waive the production of record evidence of the city accepting the above assignments.

S. BURKE, *Att'y for Pl'ff's.*
GEORGE V. HOWK,
THO'S L. SMITH, and
HENDRICKS, HORD AND HENDRICKS,
For Defendants.

Here follow copies of sundry assignments offered in evidence:

State of Indiana, Floyd County, ss, in the circuit court.

VICTOR A. PEPIN,
v.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Comp'y, William S. Pierson, Harvey Seymour, and others.

211 Judgment the defendants William S. Pierson, and Harvey Seymour, as trustees for bondholders Heman Ely, Augustus H. Moss, and others, for the sum of $54,855, and costs of suit, November, A. D. 1857, of which amount $1,035 was recovered for the use and benefit of Augustus H. Moss. For value received I hereby sell and assign to Stevenson Burke all of my interest, right, and title in and to the above judgment, and all rights, liens, equities, and interests belonging to me, or growing out of the same. This assignment is subject to all unpaid costs, taxes, and assessments, and said Burke is authorized to collect said judgment at his own costs and expenses, either in my name or otherwise, as he deems most to his benefit, but as to save me harmless from costs, att'y's fees, and expenses.

November 21, 1867.

AUGUSTUS H. MOSS. [SEAL.]

State of Indiana, county of Floyd, in the circuit court.

VICTOR A. PEPIN
v.
WILLIAM S. PIERSON, JR., AND HARVEY SEYMOUR, trustees, Samuel J. Andrews and wife, N. A. & S. C. J. R. R. Co. et al.

212 Judgments for defendants as such trustees on the 14th day of November, A. D. 1857, for the sum of fifty-four thousand eight hundred and fifty-five dollars and costs of suit. For value received we hereby sell, assign, and transfer to Stevenson Burke, of Elyria, three thousand and one hundred and five dollars of the above judgment or decree, that being the amount of said judgment which was recovered by said trustees for our use, and we hereby sell, transfer, and assign to said Burke all property, real and personal, held by Heman Ely, esq., or others, as the proceeds of said judgments for our use, and we authorize him to possess himself as fully of all benefit of said judgment or decree, and the bonds on which the same was rendered, and the real and personal property, rights, and equities belonging to us by reason thereof as fully as we ourselves could do. This assignment is made subject to the unpaid assessments and costs in said case and touching said property.

SAM'L J. ANDREWS. [SEAL.]
CATHARINE D. ANDREWS. [SEAL.]

Witnessed by—
THOMAS M. DAY.
E. P. DAY.

Dated at Hartford, Conn., Dec. 9th, 1867.

213 State of Indiana, Floyd County, ss, in the circuit court, November 14th, 1857.

VICTOR A. PEPIN
v.
N. A. AND S. C. J. R. R. Co., WILLIAM S. PIERSON, jr., and Harvey Seymour, trustees for Rollin C. Dewitt, and others.

Judgment for said Pierson and Seymour as trustees, against said R. R. co., for fifty-four thousand eight hundred and fifty-five dollars and costs of suit, of which amount five thousand one hundred and seventy-five dollars ($5,175) was recovered for the use of Rollin C. Dewitt, and seven thousand two hundred and forty-five dollars ($7,245) for the use of Elijah Dewitt, and four thousand one hundred and forty dollars for the use of George R. and Horace C. Starr. For value received we hereby sell, assign, transfer, and set over to Stevenson Burke, of Elyria, Ohio, the several amounts and shares of the above-named judgment standing in our name, and recovered severally for our use and benefit, and authorize him to collect the same in our name, or otherwise as he may see fit, at his own costs.

HORACE C. STARR. [SEAL.]
ELIJAH DEWITT. [SEAL.]
ROLLIN C. DEWITT. [SEAL.]
GEORGE R. STARR. [SEAL.]

ELYRIA, *November 18th*, 1867.

214 The State of Indiana, Floyd County, ss, in the circuit court, October term, 1857.

VICTOR A. PEPIN
vs.
WILLIAM S. PIERSON, JR., AND HARVEY SEYMOUR, trustees, Sarah Coit Day, and others, including N. A. & S. C. J. R. R. Co.

Judgment for the defendants Pierson and Seymour, November 14th, 1857, for said trustees for the sum of fifty-four thousand eight hundred and fifty-five dollars and costs of suit, of which sum five thousand one hundred and seventy-five dollars was recovered for the use of Sarah Coit Day. The said Sarah Coit Day having departed this life, and the undersigned having been duly constituted her personal representative, for value received I hereby sell, assign, transfer, and convey to Stevenson Burke, of Elyria, Ohio, so much of the above judgment or decree as was recovered for the use of said Sarah Coit Day, and all the real estate held by Heman Ely, esq., of Elyria, Ohio, in trust for her or her heirs upon account thereof, and all property, real and personal, growing out of said judgment, and all rights, equities, and interests accruing therefrom, and all right and title to the bonds belonging to said
215 Sarah Coit Day, upon which said judgment and decree was rendered, so that said Burke shall have and hold all the right and title to said bonds, judgment, and decree which belonged to said Sarah Coit Day or her personal and real representatives, and he is hereby authorized to collect said judgment and sell and dispose of said real property for his own use and benefit, but at his own costs and charges; and

said Burke is to take this assignment subject to all unpaid assessments upon the property.

Dated at Hartford, Con., Dec. 9th, 1867.

THOMAS M. DAY, [SEAL.]
Executor of Sarah Coit Day.

Witnessed by—
W. J. ANDERSON,
CHA'S W. LUCAS.

In the circuit court of Floyd County, Indiana.

VICTOR A. PEPIN
v.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

Judgment on the 14th day of November, 1857, vs. said railroad company, and in favor of William S. Pierson and Harvey Seymour
216 as trustees for $54,855, of which sum four thousand one hundred and forty dollars was for the use of George R. and Horace C. Starr, the interest of said George R. and Horace C. Starr having been assigned to me. For value received I hereby sell and assign said interest of $4,140, heretofore belonging to said Starrs, to Heman Ely, without recourse on me.

STEVENSON BURKE. [SEAL.]

ELYRIA, *December 20th*, 1868.

An ordinance to compromise and settle with the New Albany and Sandusky City Junction Railroad Company, and for the settlement of the suits now pending in the Floyd circuit, in which John Briggs and Peter Tellon are plaintiffs, and the City of New Albany and others are defendants.

Passed August 17, 1857.

Section 1, recital and preamble; 2, mayor authorized to compromise; 3, railroad company to deliver up bonds, &c.; 4, city assumes the payment of certain debts; 5, city shall pay the costs of certain suits, &c.; 6, duties of railroad company; 7, repeal; 8, when ordinance shall take effect

SECTION 1. Whereas it has been represented to the common
217 council of the city of New Albany, by the report of the president and directors of the New Albany and Sandusky City Junction Railroad Company, issued April 30th, 1857, that said company have suspended all operations upon the work of said railroad; and whereas it is shown by the report of said company that they have expended all the cash and real estate which said company received for stock in said railroad company, and, furthermore, it is shown by the report of said company that they have pledged the bonds issued to said company by the city of New Albany to sundry persons for sundry amounts, although the validity of said bonds are questioned, and a suit is now pending in the Floyd circuit court to test the validity of the bonds issued to said railroad company by the city of New Albany; and whereas it has been represented to the common council of the city of New Albany that the said New Albany and Sandusky City Junction Railroad Company wish to compromise with the said city of New Albany and deliver up the bonds of the city: Therefore—

SECTION 2. *Be it ordained by the common council of the city of*
218 *New Albany*, That Franklin Warren, mayor of said city, be, and he is hereby, authorized, empowered, and directed, in the name and on behalf of said city, to settle and compromise with the New Albany and Sandusky City Junction Railroad Company on the terms hereinafter stated.

SEC. 3. The New Albany and Sandusky City Junction Railroad Company shall deliver to the mayor of the city of New Albany all the bonds and coupons which the city of New Albany issued to said railroad company, (except seven bonds now in the hands of third parties, and the coupons which have been paid for by the city previous to the date of this ordinance,) and cancel the subscription of stock subscribed for by said city, and shall consent to the repeal of all ordinances and amendments to ordinances in conflict with the provisions of this ordinance.

SEC. 4. The city of New Albany hereby agrees and binds herself, immediately after said bonds and coupons are surrendered, and repeal all ordinances as contemplated by the provisions of this ordinance; and, on the cancelling of said railroad subscriptions, then, and not before, to assume and pay to the Ohio Insurance Company the sum of
219 thirty-six thousand dollars, which said New Albany and Sandusky City Junction Railroad Company is now owing to said insurance company, which debt is now due; the same may be paid and reserved out by said city, according to the rules of said company; but the first call and renewal may be paid by the city in city orders, at cash rates.

SEC. 5. The city of New Albany shall assume and pay all the costs in the suits heretofore dismissed, or now pending, wherein John Briggs and Peter Tellon were and are plaintiffs, and the said city, railroad, and others are defendants, brought to test the validity of the tax assessed by said city for Sandusky City Junction railroad purposes; also the fees of the attorneys of said Tellon and Briggs, as agreed between them and their said attorneys, and said city, and attorneys of said railroad company; and shall also consent that the Floyd circuit court, at its ensuing session, may, on the application of said Tellon and Briggs, enter in each case an order and decree, perpetually restraining and enjoining said city, her officers, as also the said railroad company,
220 from taking any further steps to enforce or collect any tax or taxes assessed against said Tellon and Briggs, for New Albany and Sandusky City Junction Railroad Company purposes, and vacating and annulling all sales of their property heretofore made therefor; and the said city shall at once redeem any and all property by the city collector sold for the taxes, for the purposes of said railroad, and said city shall make provisions for all persons who have paid taxes on account of said railroad.

SEC. 6. The New Albany and Sandusky City Junction Railroad Company shall use all reasonable measures to make such arrangements as will eventually secure the completion of said road according to the plan contemplated in the organization of the aforesaid railroad company, and that said road-bed and appurtenances shall never be used for any other than railroad purposes; and whenever any part or portion of said road is completed and put in use, the southwestern terminus thereof shall be at New Albany.

SEC. 7. All ordinances and amendments to ordinances in conflict with the provisions of this ordinance be, and the same are hereby, repealed.

221 SEC. 8. This ordinance shall be in force, and take effect on and

after its due publication, and the due acceptance of said ordinance by the New Albany and Sandusky City Junction Railroad Company.

Depositions of sundry witnesses taken in action pending in the circuit court of the United States for the district of Indiana, wherein Heman Ely et al. are plaintiffs, and The New Albany and Sandusky City Junction Railroad Company et al. are defendants, on the part of the plaintiff, at the place hereinafter mentioned—Hon. S. Burke appeared on behalf of the plaintiffs; the defendants did not appear by attorney or otherwise.

Heman Ely, of the county of Lorain, in the State of Ohio, of lawful age, being first duly sworn according to law, as hereinafter certified, deposes as follows:

1st. Question by plaintiffs' attorney. State your name, age, resi-
222 dence, and if you are one of the plaintiffs in the above cause.

Ans. My name is Heman Ely; my age, 48 years; I reside in Elyria, Ohio; I am one of the plaintiffs in the above action.

2d. By the same. State whether you held some of the bonds of the above-named railroad company in 1856 & '7; if so, how many and what became of them.

Ans. I did hold of the real estate bonds of said company on and previous to July, 1867, eight thousand dollars. I held them in my own right. Said bonds were reduced to judgment in a suit commenced in Floyd County, Indiana, in Nov., 1857, by Victor P. Pepin, against said railroad company, the trustees Pierson and Seymour, and others. In the latter part of March, 1858, I was present at the sale of the real estate described in the mortgage from said railroad company to the above-named trustees Pierson and Seymour. I then had with me the eight $1,000 bonds above referred to. I also had with me 44 bonds of like description held by the following parties, to wit: C. Arther Ely, fourteen; Elijah Dewitt, seven; R. C. Dewitt, five; George R. and H. C. Starr, four; Sarah Day, five; Catharine D. Andrews, three; John P. Putnam, six; all of which bonds I placed in the hands of Smith
223 and Kerr, attorneys for said bondholders. I was acting for myself and the other bondholders above mentioned.

3d. By the same. State what, if any, agreement you ever entered into with the said railroad company, by which you received from it the real estate, or any part of the real estate, described in said mortgage, or any other real estate.

Ans. I never entered into any agreement whatever concerning real estate, or on any other matter, with said railroad company.

4. By the same. State what agreement you ever authorized any person to make with said railroad company in respect to real estate on behalf of yourself or others.

Ans. I never authorized any one to make any agreement or agreements on that subject or any other subject, either on my own behalf or on behalf of anybody els, with said railroad company.

5. By same. State what proposition said railroad company made to you, if any, to take any real estate in payment, satisfaction, or extinguishment of the indebtedness upon said bonds to yourself and others.

Ans. I have never received any propositions from the said rail-
224 road company on that subject, and have never had any communications with said company, either written or verbal, on that or any other subject.

6th. By the same. State whether the part of the property described in said mortgage partitioned to you was received by you in any other manner than is shown by the deeds and records in Floyd County, Indiana, in respect thereto.

Ans. It was not received in any other way so far as I know, and, to the best of my knowledge, the records of Floyd County, Indiana, show the true state of the case in respect to that property.

7th. By the same. State whether you ever agreed or authorized any one else to credit upon said indebtedness, bonds, or mortgage, or judgment rendered thereon to said railroad company, anything further or more than the real estate sold for at public sale upon account thereof; if so, state such agreement or authority fully and particularly.

Ans. I never made or authorized any such agreement; so far as I ever knew or authorized, the real estate was taken at the price it sold for at public sale, and was to be credited at the price at which it sold.

225 8th. By same. State from whom you received your eight bonds, and, so far as you know, from whom the others, held by other parties, were received.

Ans. My bonds, and also the other bonds above referred to, were received from the contractors Sebra and Charles Howard.

9th. By same. State what knowledge or information you ever had of any compromise or agreement between said railroad company and the city of New Albany, by which said city was released from the payment of its bonds issued to said railroad company for its stock, and by which it was released from its subscription to the stock of said company.

Ans. I never heard of any such transaction till so informed by my attorney, S. Burke, within the year last past.

10th. By same. State what knowledge you had at the time of the partition of said real estate, or at any time previous thereto, that any of the real estate bonds held by Montgomery, Smith, Weir, or other persons, at New Albany, were held by them only as collateral security, and that they were not entitled to judgment thereon for the full amount thereof.

226 Ans. I never knew anything about it, and had no knowledge on the subject, and have been informed that such was the fact for the first time within the year last past.

11th. By the same. Look at the deed marked No. 841, now shown you, and state what, if anything, you were to pay said railroad company for the bond therein described over and above the amount specified in said deed, if anything.

Ans. I am not now, and never have been, under any obligation to pay anything more than is expressed in said deed for said real estate. I took said real estate by virtue of said deed and in accordance with the terms thereof, and so far as the railroad company is concerned, the deed and the records show the entire transactions concerning said real estate between us. The deed above referred is hereto attached, and is No. 841; the only agreement I ever had respecting said real estate was the one dated about March 30th, 1858, constituting Victor A. Pepin and Michael C. Kerr, trustees, for the bondholders to bid off the real-estate mortgage, and other real estate, and the verbal agreement of partition in the

227 fall of the same year, both of which agreements were between the bondholders, and to which the railroad company were not a party. I had a copy of the first-mentioned agreement, but delivered the same to S. Burke, my attorney in this suit.

12th. By the same. State whether the railroad company was a party to the partition of the real estate, made between the bondholders in the

fall of 1858. State how and between whom the partition was made, and all the facts connected therewith so far as it may effect this case.

Ans. The railroad company was not a party to that partition; the value fixed upon the property was fixed by the bondholders, simply as between themselves and to aid them in a partition of the same, and was taken by said bondholders without reference to the judgment against said company or any interest the company had in the same; the value fixed for the purposes of that partition had no reference to the real value of the property at that time, the property having been bid off at public sale some time previous thereto.

13th. By the same. State what knowledge you have, or ever
228 had, of any release by the railroad company of the original subscribers to the articles of association of said railroad company of any of the stock by them subscribed, or of any assignment thereof, or arrangement whereby the same was merged in the stock subscribed by the city or otherwise extinguished.

Ans. I have no knowledge whatever on that subject, save some information received from S. Burke within the year last past.

I, Laertes B. Smith, a notary public within and for the county of Lorain, and State of Ohio, do hereby certify that the above-named Heman Ely was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, according to law; that the foregoing deposition by him subscribed was reduced to writing by me, and by said witness subscribed in my presence; that said deposition was taken on behalf of the plaintiffs; that the defendants did not appear by attorney or otherwise; that said deposition was taken at my office in Elyria, Lorain County, Ohio, on the 6th day of February, 1869, between
229 the hours of 8 o'clock a. m. and 9 o'clock p. m. of said day, pursuant to the notice hereto attached.

In testimony whereof I have hereto set my hand and official seal this 6th day of February, A. D. 1869.

[SEAL.] LAERTES B. SMITH,
Notary Public.

This indenture, made this 27th day of October, 1858, between Charles Fredrick, sheriff of Floyd County, Indiana, of the first part, and Heman Ely of the second part, witnesseth:

That whereas, on the 11th day of June, 1858, there was issued out of the Foyd circuit court an order of sale duly certified and attested by the clerk thereof, on a judgment therein rendered on the 13th day of May, 1858, wherein Victor A. Pepin was plaintiff, and the New Albany and Sandusky City Junction Railroad Company, Thomas L. Smith, John S. Davis, James Montgomery, William M. Weir, William B. Lent, Charles B. Applegate, and John S. McDonald were defendants, in favor of said Pepin, Smith, Davis, Montgomery, Weir, Lent, Applegate,
230 and McDonald, each in his own right and against the said railroad company, for the sum of eighteen hundred dollars each, and costs of suit; which order of sale, certified and attested as aforesaid, was directed to the sheriff of Floyd County, came to his hands on the 12th day of June, 1858, and commanded him that he cause to be sold according to law the several lots and parcels of real estate in said order of sale described, and have the moneys from such sales arising before said court, to render unto said parties respectively, to satisfy said judgment, interest, and costs of suit:

And whereas, after advertising the time and place of sale in the manner prescribed by law, the said Charles Fredrick, sheriff as aforesaid,

did, by virtue of said order of sale, between the hours of 10 o'clock a. m. and 4 o'clock p. m., of this 27th day of October, 1858, at the door of the court-house of said Floyd County, after first offering the rents and properties of each and all of the several of real estate in said order of sale described for a term of years not exceeding seven, and receiving no bid therefor, then and there seperately offer and sell at public auction, in fee-simple, to said Heman Ely, out-lot No. two, (2,) in the first range of out-lots in the city of New Albany, Floyd County, Indiana,
231 for the sum of fifty dollars; also lot 12, on Lower 7th street, of John Evans' plat of lots letters "D, E, F," on Lower Water street, in said city, for the sum of five dollars; also lot No. 14, in the same plat, for the sum of five dollars; also lot 16, in the same plat, for the sum of five dollars; also lot No. 17, in the same plat, for the sum of five dollars; also lot No. 18, in the same plat, for the sum of five dollars; also lot No. 19, in the same plat, for the sum of five dollars; also lot No. 20, of the same plat, for the sum of five dollars; also lot No. 21, in the same plat, for the sum of five dollars; also lot No. 22, in the same plat, for the sum of five dollars; also No. [No.] 23, in the same plat, for the sum of five dollars; also lot No. 24, in the same plat, for the sum of five dollars; also lot No. 25, for the sum of five dollars, in the same plat; also lot No. 26, in the same plat, for the sum of five dollars; also lot No. 16, on Evans street, in said platt, in said city, for the sum of five dollars; also lot No. 17, in the same plat, for the sum of five dollars; also lot No. 23, in the same plat, for the sum of five dollars; also lot No. 25, in the same plat, for the sum of five dollars; also lot No. 27, in the same
232 plat, for the sum of five dollars; also lot No. 29, in the same plat, for the sum of five dollars; also the southern ten (10) feet in front and rear by 120 feet deep of lot No. 19, in the same plat, for the sum of five dollars, they being the highest and best bids respectively made therefore:

Now, therefore, to confirm unto the said Heman Ely the sale so made as aforesaid, the said Charles Fredrick, sheriff as aforesaid, in consideration of the premises and the payment of the said sums of money, in all amounting to one hundred and fifty dollars, doth, by these presents, hereby bargain, sell, and convey unto said Heman Ely the premises above described, to him and his heirs and assigns forever.

In witness whereof the said Charles Fredrick, sheriff as aforesaid, has hereunto set his hand and seal the day and year first written.

CHARLES FREDRICK, [SEAL.]
Sheriff of Floyd Co., Ind.

THE STATE OF INDIANA, *Floyd County, ss:*

Before the undersigned, a notary public of said county, this day came Charles Fredrick, sheriff of said county, and acknowledged the
233 execution of the foregoing deed.

Witness my hand and notarial seal this 27th day of October, 1858.

[SEAL.] ROBERT M. WEIR,
Notary Public.

234 Here follows the evidence produced on behalf of the defendants:

The original articles of association of the New Albany and Sandusky City Railroad Company.

Not here repeated, because the same is exhibited with the answer of the defendant Thomas L. Smith, and is admitted to be a true copy.

Resolution of the board of directors of the New Albany and Sandusky City Railroad Company, extracted from page 21 of the book of minutes, and dated December 31st, 1853.

On motion, it was ordered that the original subscribers to the articles of association of this company be permitted, in accordance with the stipulations contained in said articles, to transfer any amount of the stock so originally subscribed by them over and above the amount of
235 six shares or three hundred dollars to the city of New Albany, said city having made a subscription to the stock of said company to the amount of fifty thousand dollars and upwards, and that the stock thus transferred be merged in the subscription already made by said city, so that the stock of said city under her present subscription with the stock so transferred shall not exceed four hundred thousand dollars, as subscribed by her.

Resolution of the board of directors of the New Albany and Sandusky City Railroad Company, page 59 same book, and dated March 7th, 1855.

On motion it was then ordered that, if the common council ratify the subscription formerly made by the city of New Albany for eight thousand shares of the stock of this company, the calls for the payment of instalments of said stock shall not exceed two hundred and fifty thousand dollars until the road shall have been completed, and put
236 in running order at least to its junction with the Ohio and Mississippi railroad; and the remaining instalments shall only be called for and used for the purpose of furnishing the road with rolling-stock, depots, and the necessary machinery and appliances for running the said road or said portion of it; and that this order be communicated by the president to the common council of said city before any action is had to ratify such subscription, and it shall be irrevocable if said subscription be thereupon ratified.

Proceedings of the directors of the same company, extracted from the same book, beginning at page 82, date 8th September, 1857.

The following resolution was then presented for the consideration of the board, to wit:

Whereas the common council of the city of New Albany have passed the following ordinance, to wit:

237 "An ordinance to compromise and settle with the New Albany and Sandusky City Junction Railroad Company and for the settlement of suits now pending in the Floyd circuit court, in which John Briggs and Peter Tellon are plaintiffs, and the city of New Albany and others are defendants.

"SECTION 1ST. Whereas it has been represented to the common council of the city of New Albany, by the report of the president and directors of the New Albany and Sandusky City Junction Railroad Company, issued April 30, 1857, that said company has suspended all operations upon the work of railroad; and whereas it is shown by the report of said company that they have expended all the cash and real estate which said company received for stock in said railroad company; and, furthermore, it is shown by the report of said company that they have pledged the bonds issued by the city of New Albany to said

238 company to sundry persons for sundry amounts, although the validity of said bonds is questioned, and a suit is now pending in the Floyd circuit court to test the validity of the bonds issued to said railroad company by the city of New Albany; and whereas to the common council of the city of New Albany that the said New Albany and Sandusky City Junction Railroad Company wish to compromise with the said city of New Albany, and deliver up the bonds of this city: Therefore—

"SECTION 2ND. *Be it ordained by the common council of the city of New Albany*, That Franklin Warren, mayor of said city, be, and he is hereby, authorized, empowered, and directed, in the name and on behalf of said city, to settle and compromise with the New Albany and Sandusky City Junction Railroad Company on the terms hereinafter stated.

"SECTION 3D. The New Albany and Sandusky City Junction Railroad Company shall deliver to the mayor of the city of New
239 Albany all the bonds and coupons which the said city of New Albany issued to said railroad company, (except seven bonds now in the hands of third parties, and the coupons, which have been paid for by the city previous to the date of this ordinance,) and cancel the subscription of stock subscribed for by said city, and shall consent to the repeal of all ordinances and amendments to ordinances in conflict with the provisions of this ordinance.

"SECTION 4TH. The city of New Albany hereby agrees and binds herself, immediately after said bonds and coupons are surrendered, and the repeal of all ordinances as contemplated by the provisions of this ordinance, and on the cancelling of said railroad subscription, then, and not before, to assume and pay to the Ohio Insurance Company the sum of thirty-six thousand dollars, which said New Albany and Sandusky City Junction Railroad Company is now owing to said insurance
240 company, which debt is now due, the same to be paid and renewed out by said city according to the rules of said company; but the first call and renewal may be paid by the city in city orders, at cash rates.

"SECTION 5TH. The city of New Albany shall assume and pay all the costs in the suits heretofore dismissed, or now pending, wherein John Briggs and Peter Tellon were and are plaintiffs, and the said city railroad and others are defendants, brought to test the validity of the tax assessed by said city for Sandusky City Junction railroad purposes, as also the fees of the attorneys of said Tellon and Briggs, as agreed between them and their said attorneys, and said city and attorneys of said railroad company, and shall also consent that the Floyd circuit court, at its ensuing session, may, on the application of said Tellon and Briggs, enter in each case an order and decree perpetually re-
241 straining and enjoining said city, her officers, as also the said railroad company, from taking any further steps to enforce or collect any tax or taxes assessed against said Tellon and Briggs for New Albany and Sandusky City Junction railroad purposes, and vacating and annulling all such sales of property heretofore made therefor, and the said city shall at once redeem any and all such property by the city collector sold for taxes for the purposes of said railroad, and said city shall make provision for all persons who have paid their taxes on account of said railroad.

"SECTION 6TH. The New Albany and Sandusky City Junction Railroad Company shall use all reasonable measures to make such arrangements as will eventually secure the completion of said road according

to the plan contemplated in the organization of said railroad company, and that said road-bed and appurtenances shall never be used for any other than railroad purposes; and whenever any part or portion of said road is completed and put in use, the southwestern terminus
242 thereof shall be at New Albany.

"SECTION 7TH. All ordinances and amendments to ordinances in conflict with the provisions of this ordinance be, and the same are hereby, repealed.

"SECTION 8TH. This ordinance shall take effect and be in force from and after its due publication and the due acceptance of said ordinance by the New Albany and Sandusky City Junction Railroad Company.

"F. WARREN, *Mayor.*

"I, W. W. Turley, clerk of the city of New Albany, hereby certify that the above ordinance was legally and regularly passed by the common council of the city of New Albany, August 17th, 1857.

"Witness my hand and the seal of said city this 18th day of August, 1857.

[L. S.] "W. W. TURLEY, *City Clerk.*"

Therefore, resolved, That this board, for and in behalf of the New Albany and Sandusky City Junction Railroad Company, hereby ac-
243 cept the proposition of said common council as far as it relates to the matters and things therein contained in relation to said railroad company, and that the president of said company be fully authorized and empowered to do and perform all the matters and things necessary to be done to [to] consummate said agreement.

On motion of V. A. Pepin, the same being seconded, the foregoing resolution was then passed by the following vote: In the affirmative—V. A. Pepin, James Pierce, John D. Rodgers, John E. Noyes, W'm B. Lent, James Montgomery, J. S. McDonald, John S. Davis; in the negative—William M. Weir.

Agreement of record.

It was admitted by the complainants, on the final hearing, that all the defendants herein mentioned in the joint answer of Thomas L. Smith and twenty-seven other defendants transferred all the stock in said New Albany and Sandusky City Junction Railroad Company sub-
244 scribed by them in excess of three hundred dollars to said city of New Albany, in compliance with the condition contained in said original articles of association, and that said transfers were so made before the first day of July, 1854, and that none of said individual subscribers was ever charged on the books of said railroad company, in respect of said subscriptions, with any stock in excess of three hundred dollars. And it was further admitted by said complainants that each of said individual subscribers fully paid sum of three hundred dollars, as called for by the railroad company, long before the commencement of this suit, intending the same as a full satisfaction of all claims against them by reason of their respective subscriptions to said articles of association, and that the same was so accepted by said railroad company; and also that they had in like manner fully paid for any and all other stock in said railroad company ever at any time subscribed by them or any of them.

245 Depositions of Thomas L. Smith, James Montgomery, John S. Davis, George V. Howk, and Stevenson Burke, witnesses produced and sworn befor me, a notary public in and for Floyd County, State of Indiana, at Kerr and Glormley's law office, No. 80 Pearl st., between Main and Market, in the city of New Albany, Floyd County, Indiana, on this 20th day of April, 1869, pursuant to the enclosed notice.

These depositions were taken on the part of the defendants in a certain action now pending in the circuit court of the United States for the district of Indiana, wherein Heman Ely and others are plaintiffs and the city of New Albany and others are defendants.

These depositions were taken at said law office instead of at the office of the clerk of the Floyd circuit court, as mentioned in said notice, in pursuance of the agreement of the parties to this suit, represented on the part of the plaintiffs by S. Burke, and on the part of the defendants by Smith and Kerr.

246 The said Thomas L. Smith, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examination by M. C. Kerr for defendants:

Question 1. State what official relations you ever sustained to the New Albany and Sandusky City Junction R'road Company.

Answer. I was one of the directors of said company; and secretary from about the time of its organization to some time in the year 1856.

Question 2. State, if you know, by whom the books of the company were kept; and whether the books indicate correctly the proceedings of the company.

Answer. I kept the minute book or record of the acts and proceedings of said company during the time I was secretary, and the entries made during that time are, I think, in my handwriting, and contain a true statement of the proceedings of the board of directors, and copies of the various papers brought before the board. The other books, or books of account, were kept by a clerk or bookkeeper; W'm H.
247 Fogg was the first bookkeeper; after him there was a Mr. Allen employed. I have no personal knowledge of the correctness of those books; but they were both competent men.

Question 3. State if you know of any suits having been instituted by any persons against the city of New Albany to test the validity of the subscription by the said city to the stock of said company, or validity of any taxes assessed by said city for the payment of the interest or principal of said subscription; and, if you know, state fully what was the market value of the bonds issued by the said city in pursuance of said subscription before the commencement of any such litigation, and how that value was effected by such litigation, and what its effects were upon the general interests of said company.

Answer. I know that, after the subscription had been made, and the railroad had commenced work upon its line of road, one or more suits were commenced in the Floyd circuit court, the object of which was to have the city enjoined from the collection of any taxes for the payment of interest upon the bonds that had been issued to the railroad
248 company for the payment of the city subscription of stock on the ground that said subscription was invalid. Before the commencement of said suits, the railroad company had endeavored to negotiate the sale of the bonds that had been issued to it by said city, and

had sold seven of the bonds to William L. Pierson, one of the trustees; at what price I do not now recollect. Efforts were being made to sell the remainder of the bonds in the city of New York, and I think they could have been sold for from seventy to seventy-five cents upon the dollar; I do not think they could have been sold for more; but, before any negotiation could be effected, information was received in the city of New York of the pendency of those suits, whereby a doubt was cast upon the validity of the bonds, and they could no be sold there or elsewhere for any price whatever, or, at least, without so ruinous a sacrifice that a sale could not be thought of. The railroad company had depended upon the sale of those bonds principally for its cash means for carrying on of its work, and, when it was found unable to sell those city bonds, it was compelled to discontinue its work, being utterly
249 unable to finish any part of its railroad. It was evident that those suits could not be determined without a long litigation, and in the mean time it had no means to pay its contractors or employees. After these suits had been commenced these bonds had no market value. I do not think that if a sale of them had been enforced they would have brought twenty-five cents on the dollar.

Question 4. State as fully as you can, from your own knowledge of the condition of the railroad company after these complications arose, what were the facts and causes which led to the adjustment and compromise between the said company and city, if any were made; and, if any such were made, what their terms were, and what the considerations were upon which they were based, giving in detail the circumstances of the company and city at the time.

Answer. While the company were endeavoring to negotiate the city bonds in its hands, amounting, I think, to two hundred thousand dollars of bonds, it had borrowed various sums of money from the Ohio Insurance Company for the payment of its cash current expenses
250 in anticipation of the sale of the bonds, and had deposited with said insurance company a quantity of those city bonds, according to my recollection, for eighty to a hundred bonds of a thousand dollars each, a collateral security for the loans it had obtained. After the failure to sell the bonds, for the reason stated in my answer to the foregoing question, the Ohio Insurance Company insisted upon the payment of the loans it had made to the railroad company, and threatened to enforce a sale of the bonds that had been deposited with it as collateral security. Under these circumstances, being satisfied that at a forced sale the bonds would be sacrificed for a little or nothing, and having no other available means to pay its debts, it was thought by the directors of the railroad company to be their duty to inform the city authorities of the condition it was in, and this lead to the compromise that was effected with the city, as carried out in the ordinance passed by the city council for that purpose. It was thought at the time by all parties it was an advantageous compromise or contract for the railroad company, as the whole amount of city bonds then in the hands of the rail-
251 road company could not have been sold for as much as was paid by the city to have them taken up and cancelled. I think that the terms and conditions of the compromise were stated in the ordinance passed by the city for that purpose, and in the entries relative thereto in the record book of the railroad company.

Question 5. State if you know whether the complainants in this action, or those under whom they claim, acquiesced in and approved or advised the adjustment that was made as you have stated, and at the time it was made, or if they had knowledge of it and of its terms.

(Objected to by plaintiffs' attorneys.)

Answer. I don't know that the present plaintiffs had at the time any knowledge of the compromise with the city. I think that the firm of S. & C. Howard, to whom the bonds now possessed by the plaintiffs were issued, knew of it. Those bonds were delivered to them in payment for work done upon the road.

Question 6. State if you know whether the bonds involved in this suit on the part of the complainants are the same bonds which were
252 involved in the suit in the Floyd county circuit by Victor A. Pepin against the New Albany and Sandusky City Junction Railroad Company and others, then owned by the same parties, the complainants herein, or those under whom they now complain, and what that suit was instituted for, and who represented the holders of said bonds in that suit as their attorneys, and who then had the actual custody and possession of said bonds, and what was done with them, if anything, in connection with that suit; and, if you were one of those attorneys for the complainants, state who employed you, and where and for whom.

Answer. The bonds represented by the plaintiffs in this suit are the same bonds mentioned in the answer of the trustees filed in the Pepin suit. I had been requested by the trustees generally to attend to any suits that might require an appearance by them. I think the first information I had of the Pepin suit was from Sebre Howard, one of the firm of S. & C. Howard, who told me that such a suit had been commenced, and requested me to look after the interests of the hold-
253 ers of certain bonds of the same description as the bonds filed by Pepin in that suit, which had been issued to S. & C. Howard in payment for work done by them, and which he had disposed of to other parties. He furnished me with a list of the holders of the bonds, and from that list I drew up the answer of the trustees, alleging that those persons held those bonds. I did not draw up answers for the seperate holders of the bonds, because I had not the bonds in possession. Some time after the judgment was rendered, towards the next spring, Mr. Heman Ely came here, bringing the bonds with him, which he delivered to me to be filed in the suit, and I so filed them.

TUESDAY, 4 *o'clock p. m.*

The further taking of depositions herein is adjourned until 9 o'clock to-morrow morning.

TUESDAY, *April 21st*, 1869—9 *o'clock a. m.*

Examination of Thomas L. Smith continued:

Answer continued. The bonds filed in that suit were those known as real estate bonds. The answer was signed by Smith & Kerr, the law firm of which I was then a member.

Question 7. When Heman Ely brought the bonds to New Al-
254 bany to be filed, as you have stated, did he know of the compromise with the city?

(Objected to by the plaintiffs' attorney.)

Answer. I think he was informed of the compromise with the city. He said he came for the purpose of making a thorough examination into the affairs of the railroad company, and of the facts connected with the judgment; and I think he did. The fact of the compromise was then publicly known; there was no idea of keeping it secret by anybody. All the matters connected with the railroad company were talked over

with him by the directors, and though I cannot certainly say that that subject was mentioned, I am quite confident it was.

Question 8. When did you first hear of any question being made as to the validity of the compromise with the city, and the cancellation of its subscription for stock?

Ans. Never, until about the time of the commencement of the present suit, or during the trial of what was called the "Lindley suit," in the Floyd circuit court in January or February in 1868.

Question 9. Did you continue to act as attorney for the parties
255 represented by you in the Pepin suit after Mr. Ely brought the bonds to be filed; and, if so, how long, and for what purposes?

Answer. The firm of Smith and Kerr, of which I was a member, continued to act as attorneys for those parties up to and during the time of the Lindley suit.

Question 10. Did you receive any compensation for such services; and, if so, by whom was it paid?

Answer. There was an agreement with Mr. Ely that the firm of Smith and Kerr was to receive two hundred dollars. This agreement was made shortly after the judgment in the Pepin case. It was for our services in that case. I cannot say whether it was paid or not.

Question 11. Did you appear for any of the parties in what is called the Lindley suit; and, if so, by what authority?

Answer. When that suit was commenced, without any specific direc-
tions, but under our general employment as attorneys for the
256 trustees of the real estate mortgage, and those parties mentioned in the answer of the trustees in the Pepin suit, the firm of Smith and Kerr filed answers for them in the Lindley suit.

Question 12. Do you know of any verbal agreement as to the issues in that suit during its trial; and, if so, what was it, giving all the circumstances?

(Objected to by plaintiffs' attorney.)

Answer. After the issues had been joined in that suit, and shortly before the trial, Mr. Burke came to this place to represent the parties for whom we had filed answers, except the trustees and myself, having purchased, as he said, the interest of some of those parties. A difference of opinion arose between him and myself as to the proper course to be pursued upon the trial, he proposing to join with the plaintiffs and file his bonds, asking the same relief as the plaintiffs, or something to that effect. I told him if that was done I should withdraw from the case, so far as the parties represented by him were concerned, and leave
him to manage it in his own way. It was finally agreed, how-
257 ever, as I understood, that we should go to trial upon the issues made upon the pleadings we had already filed. We did, accordingly, go into the trial, and commenced the trial upon those issues, but during the progress of the trial, unexpectedly to me, Mr. Burke offered and filed the paper filed by him during that trial with the bonds, claiming a judgment upon them. I then proposed to leave the case, so far as the parties represented by him were concerned, and withdraw all the pleadings I had filed for them. Mr. Burke objected to that, and said he would hold me responsible for damages if I did so. I then asked the court for time to file an answer, upon my own behalf, to the complaint filed by him. Several attorneys, representing other parties, asked for time for the same purpose. It was then agreed in open court by Mr. Burke, myself, and the other attorneys, in order to save time, that the several defendants in the suit should be permitted to give in evidence

any matters that could have been given under any answers that might be filed to his complaint.

(Answer objected to by plaintiffs' attorney.)

Question 13. What was the condition of the railroad company
258 as to debts and liabilities at the time the compromise was made with the city?

Answer. I think the company owed no debts except those due the Ohio Insurance Company, those due the Howards upon their contracts for work, and the real estate bonds.

Question 14. State whether, in the adjustment that was made of those matters between the city and the company, there was any intention on the part of any of the parties to that adjustment to hinder, delay, or defraud the creditors of said company or city.

Answer. I think there was not. It was then supposed by all the parties that that adjustment would enable the railroad company to pay off all its liabilities, and that the city was the greater loser.

Question 15. What was the value of the real estate mortgaged to secure the bonds called real estate bonds at the time that mortgage was made?

(Objected to by plaintiffs' attorney.)

Answer. I have here the mortgage which I file, marked
259 "No. 1," with a list of the property contained in it, and an appraisement by V. A. Pepin, Samuel H. Owen, and Augustus Bradley, sworn to by them, making the value of the whole property $154,855. I can only say they were very respectable men and good judges of property. Mr. Owen was recorder of the county, and Mr. Bradley auditor

(Answer objected to by plaintiffs' attorney.)

Question 16. Was that value afterwards materially changed? and, if so, state if you know by what causes.

Answer. I think it was changed very materially: First, from the failure of the Railroad company to complete its railroad; and, secondly, because about the year 1857, in consequence of the money market about that time, the value of property of all kinds in this place was greatly reduced.

Question 17. What was the number and the value of the real estate bonds issued by the railroad company?

Answer. One hundred and ten bonds of one thousand dollars each.

Question 18. Were any of those bonds sold for money; and, if
260 so, for what price?

(Objected to by plaintiffs' attorney.)

Answer. None of them were sold for money by the railroad company; the company tried to sell them, but could not.

Question 19. Was there any contract made by the parties to the Pepin suit after the judgment was rendered; and, if so, what?

Answer. There was a contract. I have not a copy now; there is one attached to my deposition, taken for the plaintiffs in this case, and I think a copy is also found in the record in the Lindley case.

Question 20. Were there any modifications afterwards made by the parties to that contract; and, if so, what?

Answer. It was afterwards modified in some respects. At the time that contract was made it was contemplated that all the property mentioned in both mortgages therein mentioned should be brought in by Pepin and Kerr at the sales under the judgments, and afterwards sold by them, and the proceeds divided. Afterwards it was thought better by the parties to divide the property thus bought in instead of

261 making a sale of it; and, for some reasons which I do not now recollect, the property sold under the judgment of sale rendered on the second mortgage was bid in, I think, by Mr. Ely on in his own name, instead of by Pepin and Kerr.

Question 21. What amount of property did the parties who are plaintiffs in this suit, or those under whom they claim, receive under that contract and its modifications, and how was it apportioned to them?

Answer. After the property covered by both mortgages had all been bid off at the sales under the decrees of foreclosure, the parties who had signed the contract above referred to all got together and made a voluntary agreement to partition the property among themselves according to their several interests. A schedule was drawn up of this property for the purpose of making such partition, and was used in making it. This schedule I now file, marked No. 2. It shows the property set off to each of the parties, and the prices at which it was agreed to be taken; and the partition thus made was afterwards carried into effect by

262 amicable proceedings in the Floyd circuit court, of which a record is contained, I think, in the Lindley suit. The property received by the parties to this suit, or those under whom they claim, as represented by Mr. Ely at that time, amounts, if I have added up the figures correctly, to $26,998, at the prices at which it was agreed to be taken by him. The names and amounts opposite the description of property show by whom each piece of property was taken, and at what prices.

Question 22. The paper marked "No. 2," to which you have referred, has the property arranged under two heads. Explain what is meant by that property under the head "Schedule of property covered by second mortgage."

(Objected to by plaintiffs' attorney.)

Answer. The property under the head "Schedule of property covered by original mortgage" is the property mortgaged to Pierson and Seymour to secure the holders of real estate bonds; and the property mentioned in the "Schedule of property covered by second mortgage" is the property that was mortgaged to Davis, McDonald, and others, and referred to in the contract before mentioned.

263 Question 23. By whom was that property bid off at the time of the sale under the decree of foreclosure, and at what prices?

Answer. I think it was bid off by Mr. Ely, but the prices at which they were bid off I do not now recollect; but I think they were merely nominal.

(Both question and answer objected to by plaintiffs' attorney.)

Question 24. State, if you know, the reason why that property was suffered to be bid off as such merely nominal prices.

Answer. It must have been because it was well understood by all the parties to the contract, as well as by the officers of the railroad company, that the property thus bid off was to be thrown into a general fund, as provided by the written contract, and appropriated at its value to the payment of the demands of the several parties in whos favor the decree had been rendered in the Pepin suit. I know, neither the other parties to that contract nor any officer of the railroad company

264 would have permitted the property to be bid off at such prices but for that understanding, those prices being entirely inconsistant with the value of the property.

(Both question and answer objected to by plaintiffs' attorney.)

Question 25. Who was present at the time of the agreement, if any was made, for the partition of the real estate referred to, and how was the value thereof ascertained and fixed by the parties?

Answer. I think all the parties were present and agreeing to the partition at the prices mentioned in the schedule marked No. 2, including both the schedules of the original and second mortgage property. The property included in both those mortgages was treated as belonging to the common fund, as provided in the contract. I do not now recollect the precise manner in which the prices were fixed, but I am under the impression that the prices were fixed in the first instance so as to cover about fifty per cent. of the amount of the bonds, any of the parties having the right to overbid that amount on any particular piece of the property, and to take it at the amount of the highest bid.
265 When there was no higher bid the several pieces of property were set off to the persons who were willing to take them to the amount of their interests in the decree at the prices fixed.

Question 26. How did it happen that so large a portion of that real estate was so apportioned to Mr. Ely?

Answer. Mr. Ely had a power of attorney from the other parties mentioned in the answer of Pierson and Seymour in the Pepin suit, authorizing him to act in their behalf, and he requested all the portions of said property which would fall to them to be partitioned in his name, because, as he said, it was contemplated to sell the property, and it would be inconvenient to have so many parties to the deeds.

Question 27. Do you know whether the parties so represented by him afterwards assented to this appointment and division?

Answer. I only know that I never heard of any objections by them. Our firm (of Smith and Kerr) had charge of the property par-
266 titioned to him for a good many years—collecting rents, and paying the taxes, and making settlements with him; and I think a portion of the property was afterwards set off by Mr. Ely to Mr. Putnam as his share, he being one of the persons represented by Mr. Ely.

Question 28. For how much of the capital stock of said railroad company did you subscribe; and for how much, if any, did you pay; and what did you do with any part for which you did not pay?

Answer. I subscribed to the articles of association, I think, five thousand dollars; afterwards, in accordance with the provisions of said articles, I transferred all of it but three hundred dollars to the city of New Albany; after the provision was made for the subscribers to the articles of association to transfer their stock (except three hundred for each) to the city of New Albany, and such transfers were made, a number of the subscribers to the said articles subscribed an additional amount of stock for the purpose of raising the amount of capital stock to as large a sum as they could. I subscribed an additional one thou-
267 sand dollars, making the amount of my retained stock, in all, thirteen hundred dollars of cash subscriptions, which I paid in full, as I think the books will show. I also subscribed some stock to be paid for in real estate, which was so paid for, and I now hold no stock that was not fully paid out.

Question 29. At what time did you so transfer the forty-seven hundred dollars of your first five-thousand-dollar subscription to the articles of association, as you have stated?

Answer. I cannot remember the precise date, but I think it was soon after the order was made by the board of directors to permit the transfer; that order was dated December 31, 1853. I transferred it before any contracts were made for the construction of the railroad, or any expenses were incurred except for surveys. There was a transfer book kept by the company, showing the dates and forms of the transfers, and

I have searched for that book and cannot find it in any place to which I have access where it is likely to be. I do not know where it is.

Question 30. Did the authorities of the city of New Albany
268 know of the stock being so transferred to said city by individuals in reduction of their individual subscriptions to three hundred dollars each?

(Objected to by plaintiffs' att'y.)

Answer. I think they did. Mr. Joseph A. Moffett was then mayor of the city, and he was also a member of the board of directors of the railroad company, and he was present at the making of the order by the directors, dated December 31, 1853. I think one or more other members of the board of directors were also members of the city council.

(Answer objected to by plaintiffs.)

Question 31. What do you know, if anything, of the reduction of their stock by other subscribers, by transfers in like manner, under the provisions of the articles of association?

Answer. I know that some other transfers were made, but I cannot say by whom or when, but I think it was generally understood that all the subscribers to the original articles of association had so re-
269 duced their stock, and think they were never charged, for more than three hundred dollars, on the book of the company, on their original subscription.

Question 32. Do you know of any other subscriptions to the capital stock of the railroad company besides those made by the subscribers to the articles of association; and, if so, what?

Answer. I think Sebra and Charles Howard, the contractors to build the road, were subscribers for stock to an amount I do not now personally recollect. I had forgotten the fact until a few days ago, when, looking over the record of the proceedings and acts of the board of directors, I found upon page 77 a proposition made by the Howards for a settlement of their claims against the company. One of the conditions of which was the cancellation of their subscription for stock, and, upon looking upon the stock ledger of the railroad company, at page 165, I find them credited with six thousand one hundred and thirty-one shares, amounting to three hundred and six thousand five hundred and fifty dollars, which I suppose is the amount of stock sub-
270 scribed by them. There are other parcels of stock credited to them in the account, which are doubtless stock that was paid to them in part payment for work done under their contract, that contract providing for part payment in stock.

Question 33. Do you know whether that stock subscription by the Howards was ever paid or not; and, if it was, how was it paid?

Answer. I don't know whether any of it was ever paid or not; but that amount could not have been paid, or any considerable portion of it, because it would have amounted, with what other payments were made to them, to a good deal more than the company owed them, they having had the contract for all the work and materials on the whole line of the road, all the material payments being made to them.

Cross-examination by Mr. Burke for plaintiffs:

Question No. one. How many times did you ever see Heman Ely?

Answer. I think I saw him two or three times: once, when, in spring of 1858, he bro't bonds down to file; and, again, when partition
271 was agreed upon. I may have seen him at other times, but don't recollect. I don't know I saw him any other time; may have done so; can't say.

Question 2. Do you remember that you told him, when here, to file the bonds of the compromise between the city and the railroad company; that is, have you now a distinct recollection of speaking to him on that subject? If so, give, as near as you can, the words you used.

Answer. I have not a distinct recollection at this length of time that I did inform him of the compromise; but my impression is that he was informed of it by some person while here. My impression is rather a deduction from the general conversation upon subject.

Question 3. Did you, as attorney for Mr. Ely, at any time, inform him that the compromise between the city and railroad was invalid as to the creditors, or any one else?

Answer. I am confident I never did; I don't think the subject was ever mentioned; I never thought, and don't think yet, that it was invalid.

272 Question 4. Do you know of Mr. Ely having at that time any other attorney in Indiana than your firm?

Answer. I do not.

Question. 5. You have said in your direct examination that you filed the answers in the Lindley case for the trustees Pierson and Seymour, and for Ely and other bondholders, who furnished you the facts set up in those answers. Did you not file them from your own knowledge of what had previously taken place in connection with the business?

Answer. I filed the answers from my own knowledge of the facts; I don't know that I had any information of the facts from anybody, except as shown by the papers in relation thereto.

Question 6th. Were you the holder of any of the real estate bonds which were put into judgment in the Pepin case; if so, how many?

Answer. I was the holder of some of the bonds; I think five.

273 Question (by the same) 7th. State from whom, under what circumstances, and upon what consideration you received those bonds?

Answer. I received them from the railroad company. They were delivered to me by the president of the company in consideration of the payment of a debt of the railroad company for which I was a surety, and which I was obliged to pay, it having been found impossible to sell the bonds for the payment of the debt, and the company having no other means by which I could be reimbursed for the payment of the debt. The debt I paid was about $2,200. There is an entry on the record book of the R. R. Co., at page 80, showing the amount of the debt, and that there was delivered to me five real estate bonds and five city bonds as security for the payment of this debt; but afterwards, upon the compromise with the city, it was necessary to take up the city bonds for the purpose of delivering them to the city, and I gave up these bonds for that purpose. Then, as the real estate bonds were considered insufficient to pay the debt, a mortgage was executed to the parties who had assumed that debt as a further security, which mortgage is

274 the one spoken of heretofore in this deposition as the second mortgage. The property specified in that mortgage was thrown into the general fund for the payment of all the real estate bonds which had been issued, as provided for in the contract before spoken of. The entry of this second mortgage will be found in the record book of the R. R. Co., at page 87.

By same, question 8. Was the price fixed upon the property at the time of the partition its true cash value, or was it simply a price fixed for convenience in making the partition without regard to its actual cash value?

Answer. The price fixed, I think, was the price at which the parties agreed to take it. The price was, I think, in some instances, more than the actual cash value. I will state here that the item set off to T. L. Smith at $5,000 00 was intended to be set off to T. L. Smith and W'm M. Weir, to cover both their claims under the decree in the Pepin case, and was so partitioned in the partition case, I receiving only the undivided half of the north half of lot No. 8, on State street.

Question 9. Who owned this property at the time of the partition?

275 Answer. It had been bid off for the benefit of the parties who held the bonds that were in judgment in the Pepin suit. It was partitioned among them as their property.

Question 10, by the same. Did you, as attorney for Mr. Ely, or any of the creditors of the railroad company represented by him in the division of the property, make any agreement with the railroad company to credit the company with anything more upon the judgments against it than the property was sold for by the sheriff or master commissioner; if yea, upon what authority did you make such contract?

Answer. I made no agreement on the subject. At the time the contract was made Mr. Ely was here himself, acting for himself and those he represented, and also at the time of the division of the property.

Question 11, by same. To what contract do you refer as having been made by Ely?

Answer. I refer to the written contract made by the parties

276 interested in the Pepin suit, and attached to my deposition taken by the plaintiffs in this case. I don't know of any other contract made upon that subject.

12. Question by the same. Did you inform Mr. Ely at any time the terms upon which you and the other directors of the railroad company held the real estate bonds held by you and them? If yea, when and where, and what did you inform him the terms were?

Answer. I think he was informed at the time the contract above referred to was made, by myself or somebody in my presence, and that was the reason why the property covered by the second mortgage was thrown into the general fund for the benefit of all the holders of the real estate bonds. The mortgagees named in the second mortgage not desiring to take any advantage of the fact that that mortgage was made to them separately, the property covered by that mortgage was not covered by the original mortgage to Pierson and Seymour as trustees.

Question 13. Am I to understand you that the property in

277 both mortgages was thrown into a general fund and divided between the creditors without regard to whether it was in first or second mortgage?

Answer. Certainly; the schedule marked "No. 2," made for the purpose of apportionment, shows that fact.

Question 14. Did you or any one else inform Mr. Ely that you held the real estate bonds as security for the amount which you had assumed to pay for the company, as shown by the record?

Answer. I don't know that the record was shown to Mr. Ely, but I think he was informed substantially of the facts as shown by it.

Question 15. Do you know of any reason why, in the division of the property, Ely got about $9,000 00 worth, as shown by the schedule of the property embraced in the 2d mortgage, while all other parties got but $1,460 00 worth?

Answer. I know of no other reason except that he selected it himself at the prices fixed, or chose to take it at those prices.

Question 16. Was not his proportion of the property received

278 under the first mortgage diminished in proportion to the amount he took of property embraced in the 2d mortgage?

Answer. I suppose it was; the whol property being thrown into one fund and divided out as if there was only one mortgage in favor of all of the holders of the real estate bonds.

Question 17. How much did the railroad company owe the Ohio Insurance Company in all, in August, 1857, at the time of the compromise with the city?

Answer. I do not know the exact amount.

Question 18. What means had the company left to pay its debts after the compromise was made with the city?

Answer. I cannot now state the exact means; I know that it had no means of any considerable amount.

Question by the same. Don't you know the suit bro't by Pepin to foreclose the real estate mortgage was pending at the time of the compromise, and that judgment was finally rendered in that case in the fall of 1857 against the city and in favor of the bondholders for about
279 $119,000 00, and that the company had no means sufficient to pay one-half the judgment?

Answer. I cannot now say, except from the dates of the compromise and of the time the suit was brought, as shown by the record. The amount of the judgment will also be shown by the record. I don't know that the railroad company had property sufficient to satisfy that amount.

Question 20. Did you not, as att'y for one Farrel, about that time take a judgment against the railroad company for about $3,000, which you were unable to collect because of the insolvency of the company?

Answer. I cannot now recollect; possibly I may have.

Question 21. You have said you did not yet doubt the validity of the compromise between the city and railroad company. When did you first have doubt about the validity of the city subscription?

Answer. I decline to give any opinion upon that subject.

280 Question (by the same) 22. Were you present at the trial of the Lindly case, before Judge Jewett?

Answer. Yes; I was present most of the time.

Question 23. Did you during that trial hear the question made or debated whether the real estate bondholders received the real estate embraced in the mortgage in full payment and satisfaction of their claims? Did you hear any evidence upon that subject upon that trial?

Answer. I cannot say that I did hear the question made or debated whether the real estate bondholders received the real estate embraced in the mortgage in full payment or satisfaction of their claims, but I do not now recollect all the questions that were made or debated on that trial. The evidence given was very voluminous, and I cannot say whether any evidence was given bearing upon that subject or not.

Question (by same) 24. Did not Judge Jewett rule out the evidence offered by you to show a judgment taken by Pepin and others against the company at first, and then, without deciding at the
281 time as to the admissibility of the evidence, receive your evidence and most other evidence subjections, so that when the trial closed counsel wer not advised of what evidence he considered in or out?

Answer. In the first instance he did rule out the record which I offered, showing the judgment in the Pepin case, but afterwards expressed a dout as to the correctness of that ruling, and received the evidence subject to objection; as to the balance of the question I am not able to give a definite answer.

Question 25. Did you have any conversation with Judge Jewett after the oral argumant closed in the Lindley case, and before he announced his decision as to his decision or what it was to be?

Answer. I may have had some talk with him, but I don't think he informed me as to what his decision would be, though he may possibly have done so before it was formally announced; but I am certain he did not inform me of any reasons for the decision, nor were any
282 talked about between him and me.

Question 26. Were you informed by Judge Jewett or George V. Howk, esq., before Judge Jewett formally announced his decision in that case, that he would find that the real estate was taken in full payment and satisfaction of the bonds and mortgage?

(Objected to by defendants' attorney.)

Answer. I cannot now say whether I was or was not so informed.

Question 27. When so informed, did you not ask, "Is there any evidence on which to base such a finding?"

Answer. As I have already stated, I don't know that I was so informed; I cannot say that I asked such a question.

Question 28. State between whom the agreement was made of which you speak, on the Lindley trial, and what was said by each party to the agreement at the time?

Answer. I have stated before that I asked time to file an answer to the complaint, embracing bonds filed by Mr. Burke, on my own
283 account as one of the defendants; other attorneys representing other defendants asked for time for the same purpose, and Mr. Burke then stated that, rather than have the trial interrupted for that purpose, he would agree that the defendants should give in evidence any matter that could be given under any proper form of pleas that could be filed by them. This was the agreement, as I understood it, made in open court in the hearing of the judge.

Question 29. Instead of the facts being as above stated, is it not true that after I filed the additional answers that you objected and demanded time as above stated; and that, finally, as the court held that I could offer the bonds under the petition or complaint of pl'ff, [that] I withdrew the answers, and the judge struck out the leave to file them, so that no leave to file answers appears of record?

Answer. There was a good deal said upon the subject, I think, at the time, but I am confident that Mr. Burke did agree that evidence
284 should be given as I have stated, and that we continued the trial under that agreement; I do not recollect whether the leave to file that paper was struck out or not, but I think that either that paper or some one in lieu of it was continued on file in the case.

Question 30. Did you not continue the trial because I withdrew the answers and the court held you must do so?

Answer. I think not.

Question 31. Do you mean to say that you agreed to any proposition made by me, after I offered the bonds on that trial?

Answer. I mean to say that we went on with the trial in consequence of the agreement which I have stated; I don't know that there was any other proposition or agreement made.

(Question repeated.)

Answer. I mean to say that we went on with the trial in consequence of the agreement which I have stated; I don't know that there was any other proposition or agreement made.

285 Re-examined by defendants' attorney:

Question 34. You have stated, in answer to the 9th cross-interrogatory of the plaintiffs' attorney, that the property was partitioned among the creditors who obtained judgment in the Pepin suit, as their property; was the amount of the bids made at the sale by the sheriff or commissioner regarded as any criterion of the value of the property for the purpose of making partition among themselves?

(Objected to by plaintiffs' attorney.)

Answer. No; quite the contrary; it had been understood that Pepin and Kerr was to bid off the property whenever any pieces of property were not bid up to what was considered a fair value by outside bidders, it being authenticated that, at a sheriff's or commissioner's sale of so large an amount of that kind of property at that time, there would be great sacrifices without some such arrangement, and that the property should afterwards be sold at fair prices by Pepin and Kerr, and the proceeds applied to the payment of the judgment, according to the

286 terms of the written contract before referred to; it was my understanding that the property was not bid off by them, except when it was not bid off by other parties at fair prices; and afterwards, when it was agreed to divide the property instead of waiting until it was sold by Pepin and Kerr, it was to be apportioned and partitioned and applied to the payment of the judgments at its fair value.

Question 35. You have said in answer to several questions that, about the time of the compromise with the city and afterwards, the railroad company had no considerable amount of property; what do you mean by property in that connection?

Answer. I mean property subject to execution or immediately available. There may have been equitable assets, such as unpaid subscriptions of stock.

Question 36. Had the fact that you received the five bonds held by you for the consideration and in the manner stated by you anything to do with or any effect upon your actions relative to the contract or to the bidding in of the property by Pepin and Kerr, or by Mr. Ely, or in his name?

287 Answer. Not the slightest, except as I have before stated, in the throwing in the property under the second mortgage for general distribution among the creditors. As to the property bid off to Mr. Ely or in his name, I had no knowledge that it was to be so bid off, or for what reason or at whose suggestion—certainly not at mine—nor have I any idea how that fact could effect my rights or interests in any way whatever.

Question. 37. Did you, directly or indirectly, receive any other compensation for the debt you paid for the railroad company except the property you received on the partition under the contract?

Answer. No; no other whatever.

Question 38. Was that property received by you worth more or less than the debt paid by you?

Answer. It was worth less; I should have been glad to have found any one to take it off my hands upon payment of the debt by him.

Question 39. You have said, in answer to the 8th cross-inter-

288 rogatory by the plaintiffs' attorney, that some of the pieces of property specified in the schedule were apportioned at prices higher than the cash value; do you mean that all the property was thus overvalued or appraised too high?

Answer. No; I do not mean so; I do not consider myself a very com-

petent judge of the value of real property. It may have been a fair average value at that time.

Re-cross examination:

Question 1. Look at the answer filed in the Lindley case, October 28, 1863, by Putnam, Ely, and others, and signed Smith and Kerr, and say in whose handwriting it is.

Answer. It is in my handwriting.

Question 2. You say the property received by you in the partition was not worth what it cost you, or the amount of your debt. How did the property set off to you compare with that set off to Ely in proportion to your judgments?

Answer. I cannot say; I do not know what the value of the property set off to Mr. Ely was.

289 Question 3. Did you not aim to make an equal partition of the property between the holders of judgments in proportion to the amount of each?

Answer. I did not participate in fixing the value of the property; I suppose and believe that was the intention.

Question 4. What written agreement do you allude to in your answer to defendants' 34th question in the commencement and close of said answer?

Answer. I mean the same written contract that I have referred to before, and that is attached to my deposition previously taken by the plaintiffs in this case.

Question 6th. Do you know of any other agreement in writing made by Ely upon that subject?

Answer. I do not know of any other agreement in writing.

Question 7. Do you know of any other agreement by Mr. Ely upon the subject of any kind; and, if so, when and where was it made,

290 and between whom, and what was said by each party to it when it was made?

Answer. I do not know of any other agreement, except modifications afterwards made of the written contract, among which was the agreement that the property should be divided instead of remaining in the hands of Pepin and Kerr to be sold; and it was certainly my understanding that at the time of the agreement for partition, Mr. Ely and all the other parties being present, it was a part of that ageement that the property should be taken at the prices affixed to the schedule marked No. 2, and applied to the payment of their several judgments at those prices.

Question 8. What was to be done with the amount that the commissioner returned the property as sold for; was the property to be credited twice, or only once, on the judgments?

Answer. I can only say that the return of the commissioner was not regarded as a return of the value of the property sold. I do not know whether there was any credit made upon the judgment or not, but it

291 was my understanding that the property was to be applied to the payment of the judgment at the prices fixed. The value of the property was to be credited upon the judgment but once, but that application was to be made according to the terms of the written contract under which the property was to be sold by Pepin and Kerr. I may possibly be mistaken as to the fact that it was to be credited upon the judgment, not having the contract before me. I will add to that that the partition of the property was to be intended as a substitute for the sale by Pepin and Kerr.

Question 9. When you drew the answer above named, in the Lindley

case, in 1863, and had the contract before you, was not your recollection of what was to be applied upon the judgment and the history of the case as clear in your mind as now; and did you not aim to set up the facts in that answer correctly?

Answer. My recollection of the case was as clear then as now, and I aimed to set up the facts of the case as far as was necessary and advantageous in the defense of that suit.

292 Question 9. Was the judgment in your favor in the Pepin case more or less than the company owed you; if more, how much?

Answer. The record shows how much the judgment was, and the debt was as I have previously stated.

Question 10. State whether all the mortgagees in the second mortgage, so called, of October 20, 1857, were not directors of the railroad co.?

Answer. I think they were all directors but Applegate.

Question 11. How did it happen that yourself and others, directors holding real estate railroad bonds, took a judgment for the whole amount due upon the bonds, including coupons, in the Pepin case; and afterwards, at the May term, 1858, when the mortgage to you and others given to secure the same debt was foreclosed, you took a judgment for only about $1,800 00 each?

293 Answer. The records in the two cases show the grounds upon which the judgments were rendered in each. I think I have already explained fully the nature of the whole transaction: that the second mortgage was an additional security for the debt which had been paid by the mortgagees. It was never expected, under either or both judgments, that the mortgagees named in the second mortgage would secure or retain more than the amount of the debt which had been paid by them.

Question 12. If you never expected to secure or retain more than was paid by you, how did it happen that you took a judgment against the company for more than twice that amount, and in the agreement making Pepin and Kerr trustees provided that Ely and others should not share in the proceeds of the 2d mortgage until you had received $2,500 00 each, an amount much greater than was due you?

Answer. I don't think that the sum of $2,500 00 was more than the amount of the debt and interest. I further think the contract made between all the parties to the judgment and Mr. Ely was made when he had full knowledge of all the facts.

294 Question 13. Have you any further explanation to give in answer to the above question?

Answer. No; excepting that we had been at considerable trouble and some expense in connection with all the matters, and if we should under the provisions of the contract have received any small amount over and above the amount of the debt and interest, which I do not know that we should, as I have not calculated the amount, it would have been no more than a fair compensation for such trouble and expense, and we never did receive any more than the amount of the debt, nor as much.

Question 14. Was not the judgment taken on the second mortgage, in favor of yourself and others, taken for the true amount due you?

Answer. I don't recollect what the amount of the judgment was. I have already stated the amount ot debt, as shown by the record of the railroad company, was $2,200; but I think there is a mistake in that statement upon the record book; the debt I actually paid was, I think, $2,260 00. I know it was more than $2,200 00.

295 Question 15. The schedule produced by you here, said to be used at the division of the property, and called schedule No. 2,

shows that there was set off to you and Weir $5,250 00 worth of property; if you paid $2,260 00, and Weir the same, that would only make $4,520 06 for both; how do you make out that you did not get more than your due from the company in view of these facts?

Answer. Only because, if there is that difference in the amounts, we did not consider the property worth as much, and in fact it was not worth as much as it is appraised at in the schedule.

Question 16. Have you not testified in this case that each party to that partition took the property at its aforesaid value, and that you supposed that to be the true value?

Answer. What I have testified is already in the record and will show for itself. I will here state, however, that there was no partnership connection between myself and Weir; but the property was parti-
296 tioned and set off to each seperately, for the payment of seperate debts.

Question 17. How did it happen, then, that there was more than $5,000 of that property set off to you individually?

Answer. It was not set off to me individually; the names upon the schedule were merely a memorandum made at the time for the basis of a subsequent partition. My name was put to that item with the understanding that it was to be divided equally between myself and Weir; and in a subsequent decree for partition, made pursuant to the agreement at the time that schedule was made, it was so divided, I receiving one undivided half of that item of property, and Weir the other.

Question 18. Will you now say, upon reflection, that each party to that partition was to take the property set off to him, and valued in the schedule at the value therein fixed, and credit the company with the amount therein fixed upon their judgments?

Answer. I don't think I have said that the judgments were to
297 be credited with the amount of the property, as specified in that schedule, but that the apportionment of the property under that schedule was to be in lieu of the sale of it by Pepin and Kerr, according to the contract, and applied in the same manner that the proceeds of the sales would, if the sales had been made; but I think the officers of the railroad company were cognizant of the arrangement that the property was to be bid in by Pepin and Kerr, and would not have permitted a large portion of that property, especially that portion sold under the second mortgage, to have been bid off at such notoriously insufficient prices, except upon the expectation that it was to be applied to the payment of the judgment at its fair value.

Question 19. Will you now have the kindness to answer the last question put to you directly?

Answer. If I have not sufficiently answered it I will. I do not say so, and have not said so.

Question 20. Have you ever, as one of the parties to that division, credited the company upon any record or judgment with the amount of property received by you; if so, when and where?

298 Answer. I don't think I have credited any records with the amount of property received by me.

Question 21. Have you ever paid over to the company the difference between the property received by you as fixed in the schedule and the amount due you from the company; if not, why not?

Answer. I have not paid over any such difference. No such demand was made upon me, and the property received by me was worth less in reality than the debt paid by me.

Question 22. Was not all the property embraced in the first mortgage

sold before the written contract above named was made, and did not such property sell at as near its true value as property of the same kind sold at public sales usually does?

Answer. I do not recollect whether the property was sold before the contract was made or not. As I have already said, I do not consider myself a very competent judge of the value of such property, or what it ought to have sold for in the market at that time, but I am under the general impression that the property sold under that mortgage was bid in at as fair prices as such property would then usually sell for at sheriff's sales.

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Question 23. Did not you and the other directors of the railroad taking judgments in the Pepin case, when you foreclosed the 2nd mortgage, credit the railroad company with the amount made for you severally by the sale of the property in the first mortgage, and thereby reduce your debt several hundred dollars each?

Answer. I do not now remember; it may probably be the case; I cannot say.

Question 24. What officers of the railroad company do you allude to as having been cognizant of the contract between [between] the creditors making Pepin and Kerr trustees?

Answer. I mean the president and directors, of course.

Question 25. Was not the president and all of the directors of the company that knew about it [about it] parties to it as bondholders and creditors of the company?

300

Answer. The records of the railroad company and the various proceedings of the company will show the facts as to that matter.

The examination being now concluded the witness desires to make the following explanations:

I have stated in my answer to the 25th question that I am under the impression that the prices of the property were fixed in the first instance so as to cover about fifty per cent of the value of the property. I did not get this impression from any knowledge I had at the time, as I have no recollection of being present when the prices were fixed, but from hearsay information solely, long after the time when the schedule was made. I, therefore, request this part of that answer to be stricken out. And, since making my answers as well to the questions in the direct examination as to those in the cross-examination of the plaintiff relative to an agreement on the trial of the Lindley case, as to the admission of evidence, after careful reflection, I desire to add the following statement: I think a paper in the nature of a complaint setting out the bonds claimed by him and his clients was filed by Mr. Burke and afterwards withdrawn, and another and shorter paper, which, however, I regarded as of the same nature, filed in its place. It may have been before the first paper was withdrawn that myself and others demanded time to answer it, and that the proposition of Mr. Burke that evidence should be admitted without such answers was made. I will further state that since the trial I have heard others state that such an agreement was made, and it is possible such statements may have produced an impression on my mind which I have confounded with my recollection of what occurred at the time of the trial, but my best impression still is that an agreement was made as I have stated, and that it was regarded as in force during the subsequent part of the trial. I further state, by consent of the plaintiffs' attorney, without a question being put to me on the subject, that the transfer made by myself and others of all the stock originally subscribed by us to the arti-

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cles of association except six shares, was treated and regarded by
302 said railroad company as a valid transfer, and that said railroad company accepted said subscription by said city in full satisfaction and discharge of all liabilities of the individual stockholders making such transfer, except to the six shares or three hundred dollars of stock so retained by each of them.

THOMAS L. SMITH.

(Question and answer objected to on the ground of irrelevancy and incompetency.)

THURSDAY, *April 22d*, 1869.

The said James Montgomery, second witness, being duly sworn to testify the truth, the whole truth, and nothing but the truth relative to said cause, deposes as follows:

Question 1. State your relations to the New Albany and Sandusky City Junction Railroad Company now and heretofore.

Answer. I was made a director at the time of the organization of the company, and some time afterwards was elected president, and I have had no successor. I acted as director and president of the company during its active existence.

303 Question 2. State if you were a subscriber to the original articles of association, and, if so, to what amount, and what did you do with your stock.

Answer. I was a subscriber to the original articles of association to the amount of $2,500, and transferred all to the city, except $300 00, which I paid to the company. I made that transfer in pursuance of the conditions contained in the articles of association.

Question 3. State if you have personal knowledge that any other persons became subscribers to the original articles of association; and, if so, who they were, and what they did with their stock, as far as you have knowledge on that subject.

Answer. As to the persons who subscribed, and the amounts they subscribed, they will be found on pages 2, 3, and 4 of the record of the acts and proceedings of the board of directors. Transfers were very generally made to the city under the conditions contained in the articles of association, each subscriber retaining $300, which was paid to the company.

304 Question 4. Look at the schedule marked "No. 2," referred to in the deposition of Thomas L. Smith, and state if you know by whom it was made, and by whom the pencil-writing on the same was made, and on what basis the values that are indicted on that paper were made.

Answer. I have examined the schedule, and I believe the most of the pencil-writing here was made by Mr. Ely. The basis upon which the value of the property was fixed was what I, as one of the appraisers, believed it to be intrinsically worth at that time.

Question 5. What was the object in making that schedule?

Answer. The object was to get the quantity of the land and the value before us for the purpose of making an apportionment between the parties interested.

Question 6. Do you know whether that apportionment was ever carried out afterwards, and how?

Answer. Yes, it was; by the parties selecting such pieces of
305 the property as would cover about 50 per cent. of their judgments in the aggregate. All the parties being present agreed to it.

Question 7. Do you know whether any legal proceedings were ever instituted for the purpose of effecting that apportionment; and, if so, what?

Answer. I can only say that I instructed my attorney to join in such legal proceedings as were necessary for that purpose, and he told me he had done so.

Question 8. Do you recollect the sale under the decree rendered on what is called the second mortgage? Was you present at the sale? and, if so, please state how the property was bid off, and by whom?

Answer. I don't recollect that I was present at the sale, and don't know by whom the property was bid off; I can only state that Mr. Ely informed me that he bid it off.

Question 9. Please look at that part of the schedule marked "No. 2," entitled "Schedule of the property covered by second mortgage,"
306 and state what you think the fair value of the property embraced under that head, in cash, was at a sheriff's sale.

(Objected to by plaintiffs' attorney.)

Answer. I cannot possibly state what it would bring at sheriff's sale. The property was worth what it is estimated at here at the time the figures were put down.

Question 10. State, if you know, whether at the time of making that appointment there was any understanding or agreement among the parties as to the effect or result of the apportionments in reference to the judgments which had been obtained by them; and, if so, what?

(Objected to by plaintiffs' attorney.)

Answer. I believe there was an understanding among the parties there that the property each received in that division was about 50 per cent. of the amount of their judgments, and I supposed that the judgments would receive credit, and knew nothing to the contrary until this suit commenced, as I expected my attorney to make the credit for me for that amount. I think it was further said at the time that the available means of the company were exhausted, and therefore we would
307 not be able to obtain anything more upon our judgments.

Question 11. Do you know whether or not at that time a compromise which had been made by the railroad company with the city for the cancellation of the city stock was spoken of in the presence and hearing of Mr. Ely, or whether he was otherwise informed of it?

(Objected to by plaintiffs' attorney.)

Answer. I cannot say whether it was spoken of in his presence or not. It was very generally known here, having been published in the papers.

Question 12. If Mr. Ely had made any enquiries into the condition of the stock of the company, would he have had any difficulty in ascertaining that such a compromise had been made?

Answer. He would not.

Question 13. Did you know the firm of S. and C. Howard? and, if so, state who composed that firm.

Answer. Sebre and Charles Howard.

308 Question 14. State what manner of men they were as to respectability and business qualifications at that time.

(Objected to by plaintiffs' attorney.)

Answer. They were energetic, active business men; and, as far as I know, were amply responsible for their contracts then.

Question 15. Please look at the record book of the board of directors of the railroad company, at page 31, and state whether the contract there recorded was the contract made with the company by them.

(Objected to by plaintiffs' attorney.)

Answer. The company made a contract with them which is set out at page 31.

Question 16. Please look at the same order book, at page 94, at the date of October 26th, 1860, and state whether the proposition there entered, as from them, was or was not the basis of the final settlement which was made with them.

(Objected to by plaintiffs' attorney.)

309 Answer. This proposition on pages 94 and 95, of the order book, was the basis on which the company made a final settlement with the Howards.

Question 17. State whether, from the time of the making of that contract up to the time of their final settlement, they were or were not fully acquainted with the affairs of the company and the condition of the stock subscriptions.

(Objected to by plaintiffs' attorney.)

Answer. They were fully acquainted with them.

Question 18. Do you know whether or not, at the time of the compromise with the city for the cancellation of the city stock, they were informed of that compromise and its conditions?

(Objected to by plaintiffs' attorney.)

Answer. They were informed of the compromise, and, I believe, the conditions.

Question 19. State, if you know, if any amount of the railroad company's stock was subscribed by them, and, if so, what amount; and whether the subscription, or any part thereof, has been paid?

310 (Objected to by plaintiffs' attorney.)

Answer. My recollection is that they subscribed $300,000 00, but it may be better shown by the books of the company; I don't recollect whether any part of it has been paid or not; that will also be better shown by the books of the company.

Question 20. Please look at the stock ledger of the company at page 165, and state whether the amount of stock held by them is there stated, and explain the entries as well as you can.

(Objected to by plaintiffs' attorney.)

Answer. I see they are credited with various amounts of stock here. They agreed to take a certain portion of the amount of their contract in stock, and these amounts here were the amounts of stock they received in their monthly estimates, except one, which was capital stock, and one other, transferred from J. P. Allen, of $13,100 00. The item of $306,590 was their subscription of stock, which remains unpaid, or any part of it, that I recollect. I think there was a contingency in that subscription; that was, if the city took $400,000 00 stock their sub-

311 scription was to be considered valid.

Question 21. Was or was not this contingency that you have spoken of made in a proposition to subscribe so much stock if the city would subscribe, or was the subscription made before the city had subscribed?

(Objected to by plaintiffs' attorney.)

Answer. My recollection is that it was in a proposition to subscribe the $300,000 00 if the city would subscribe; and the Howards did subscribe after the city had made its subscription.

Question 22. Look upon the balance ledger of the railroad company, and state when this item of $306,590 is first entered there; and also upon the general ledger at page 171, and state if you can tell from those entries at what time this subscription of stock of the Howards was

made, and whether it appears from the books of the company that any part of it has been paid; and, if so, what.

(Objected to by plaintiffs' attorney.)

312 Answer. It appears upon the balance ledger November 1st, 1855, on the general ledger at page 171. They are charged with $306,590, but no part of it appears to be paid. The subscription must have been made about the time of the entry in the general ledger, Sep. 5th, 1855.

Question 23. Please state about what time the company suspended work upon its road?

Answer. I think it was some time in 1857.

Question 24. How many city bonds did the city issue to the railroad company?

Answer. Two hundred thousand dollars.

Question 25. Were any of these bonds sold for money; and, if so, how many, and for what price?

Answer. There were seven of them sold for money at 75 cents to the dollar, as near as I recollect; they are still outstanding and unpaid.

Question 26. What became of the other 193 bonds.

Answer. They were returned to the city by the company.

313 Question 27. State why were the bonds returned to the city; for what purpose.

Answer. They were returned under a compromise between the railroad company and the city. The company was indebted to the Ohio Insurance Company in a large amount of money, ranging from $35,000 to $45,000; I don't recollect the precise amount. The city proposed to pay that debt in consideration of surrendering 193 bonds of a thousand dollars each by the company; and, in view of the bonds being rendered useless to the company in consequence of the various suits, and the noise and clamor of a portion of the citizens, the railroad company accepted the proposition from the city, the company believing it was better to give up the bonds and have the debt paid than to hold them in their then worthless condition. It was a part of the agreement that the railroad company should cancel the city's subscription for stock.

Question 28. State for what purposes that debt to the Ohio In-

314 surance Company was incurred, and how the railroad company expected to obtain means to pay it.

Answer. It was incurred for the purpose of going on with the work on the road, assist in paying the monthly estimates, &c.; they expected to obtain means to pay it by the sale of those city bonds.

Question 29. Between the time of the sale of those seven bonds to Peirson and the compromise with the city, what difference, if any, had occurred as to the value of those bonds?

Answer. If there had been no suits commenced, nor any contest with the citizens in relation to their validity, the bonds would have readily brought 75 cents on the dollar; but in consequence of these suits being brought between the time of the sale to Pierson and the time of the compromise with the city, they were rendered entirely unsaleable.

Question 30. Were any of those bonds held by the Ohio Insurance Company; and, if so, under what circumstances, and for what purpose?

315 Answer. The Ohio Insurance Company held some 80 bonds of a thousand dollars each as collateral security for her debt.

Question 31. Do you know whether or not those debts were due before the compromise was made with the city, and whether the Insur-

ance Company threatened to take any proceedings in relation thereto; and, if so, what?

Answer. I think the debt was mostly due; it was in various sums. I think the Ohio Insurance Company threatened to sell the collateral securities, or offer them for sale, if there was not some provision made for the payment of their debts.

Question 32. Was or was it not in the power of the railroad company to make any provisions for the payment of the debt so as to prevent a sale by the Ohio Insurance Company of the city bonds so held by them as collaterals?

Answer. They had no available cash means, nor any other means better than what the insurance company held; therefore they could
316 not pay the debt so as to prevent a sale of the bonds.

Question 33. State what influence, if any, the condition of these bonds deposited as collateral had in bringing about the compromise with the city.

(Objected to by plaintiffs' attorney.)

Answer. I think it had a very considerable influence with both the city and the railroad company; the consequence of the compromise not being had would have been that the bonds would have been offered for sale; whether they would have brought anything or not, I cannot say.

Question 34. State what, in the best of your opinion, the whole of the 193 bonds of the city was worth at that time, and what amount of money could have been raised upon them by sale or otherwise.

Answer. It is a question that I cannot answer. There did not appear to be any value upon them, they got so low down; there was so much fuss about them. The railroad company thought it was a good arrangement to have the city pay the debt to the Ohio Insurance Com-
317 pany, and the railroad company give up the city bonds, 193, and cancel the city stock.

Question 35. Who made the first proposition to compromise, the city or the railroad company?

Answer. I do not clearly recollect.

Question 36. Can you state whether or not the city was advised as to the conditions of the bonds that were pledged as collaterals before the compromise was made?

Answer. She was advised of the condition of the bonds; the railroad company being unable to make sale of them to pay the debt of the Ohio Insurance Company for which they were pledged.

Question 37. Please state whether or not the 193 bonds returned to the city pursuant to the compromise could at that time, or within a reasonable time thereafter, have been sold by the railroad company for more money than was paid for them by the city pursuant to the compromise; and, if so, how much.

(Objected to by plaintiffs' attorney.)

318 Answer. I think they could not have been sold for more money than was paid for them by the city, for the reason that the president and secretary made efforts to sell them in the city of New York and elsewhere, and failed to get an offer for them at any price.

Question 38. State whether or not those bonds could have been disposed of in any other way more advantageously to the interests of the railroad company or its creditors; and, if so, in what way?

(Objected to by the plaintiffs' attorney.)

Answer. I think they could not have been at that time, or any reasonable time thereafter.

Question 39. What do you mean by reasonable time?

Answer. Any time during the liquidation relating to the bonds then pending in the courts.

Question 40. What was the condition of the railroad company in relation to debts at the time the compromise was made with the city?

319 Answer. She owed this debt to the Ohio Insurance Company, previously spoken of, and, I think, something to her officers for services. She owed another debt, which had been assumed by some of the directors in the three banking institutions—the Ohio Company, the Bank of the State at New Albany, and the Bank of the State at Jeffersonville, amounting, I think, to about $18,000 00. I don't recollect any other debts. I think the railroad company probably owed the contractors something, which was afterwards settled, as the books of the company will show

Question 41. In making the compromise with the city, was there or not any intention of the railroad company to hinder, delay, defraud, or otherwise injure its creditors?

(Objected to by plaintiffs' attorney.)

Answer. There was no such intention as I am aware of.

Question 42. At the time of the reduction of stock by the individual subscriptions to the articles of association, pursuant to those articles, and the orders passed by the board of directors of the railroad

320 company for that purpose, were or were not the city authorities informed of the provisions to that effect in the articles of association, and the said order passed by the board of directors, and of the intention of the individual subscribers to make such reduction?

(Objected to by plaintiffs' attorneys.)

Answer. I think there was no doubt of it. The mayor of the city, and one or more members of the city council, were parties to the articles of association and directors of the railroad company afterwards.

Question 43. After the reduction of stock had been made by the several individual subscribers to the articles of association, to the sum of $300 00, was that amount of stock so retained by them in all cases fully paid up?

Answer. In the foregoing part of my deposition I stated that I believed that the $300 of each subscriber had been paid up; but I find, upon examination of the stock ledger, that I was mistaken; that some of the subscribers had not fully paid, and some of them paid nothing.

321 Question 44. When did you first heare of any question being made as to the validity of the compromise with the city, and the cancellation of its subscription for stock?

(Objected to by the plaintiffs' attorney.)

Answer. I have no recollection of hearing the validity questioned until the commencement of the present suit by Ely and others in the federal courts.

Cross-examination by S. Burke, for plaintiffs:

Question 1. Did not the city of New Albany vote upon its stock at the various elections of directors of the company, and take such interest in the affairs of the company as other stockholders did?

Answer. I think she did up to the time of the compromise.

Question 2. State whether the city of New Albany, in 1857, and from that time up to the present time, was responsible and perfectly able to pay all its legal obligations?

322 Question 3. Was not the market value of the city bonds in 1857 affected and depressed wholly in consequence of the suits brought against the city to enjoin the collection of taxes for their payment, and by the clamor of the citizens of the city in respect thereto, and not by reason of any inability of the city to respond to its legal obligations?

Answer. I think so. The clamor was about the legality of the bonds, which, together with the suit brought to enjoin the collection of taxes, brought such an odor upon those bonds that they could not be sold, and not on account of any inability of the city to pay interest, or otherwise.

Re-examination for defendants:

Question 1. Was this clamor you have just spoken of raised by the citizens of New Albany generally, or by a portion of the citizens only; and, if so, by what proportion of the citizens?

Answer. It was not raised by the citizens generally, but that portion which opposed the railroad subscription by the city; the number I cannot definitely say, but it was a minority, aided by one or more of among the best lawyers of the place.

JAMES MONTGOMERY.

323 SATURDAY, *April 24th*, 1869.

John S. Davis, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Question 1. Mr. Davis, please state whether you held any office in the Ohio Insurance Company in the year 1857; and, if so, what.

Answer. I was a director and acting a president of the company.

Question 2. State, if you know, whether the New Albany and Sandusky City Junction Railroad Company was indebted to the Ohio Insurance Company in any amounts; and, if so, what amounts, and for what purposes was the indebtedness incurred in 1857?

Answer. In 1857, I believe it was, the New Albany and Sandusky City Railroad Company borrowed of the Ohio Insurance Company, I think, about $35,000, in anticipation of expected sale of city bonds. The money was borrowed to be used in the construction of the road and in making necessary surveys, &c.

Question. State if the Ohio Insurance Company held any col-
324 lateral securities for the payment of that debt; and, if so, what.

Answer. The railway company deposited with the insurance company, as collateral security for the debt, bonds of the city of New Albany, amounting, I think, to about $80,000.

Question 4. Please state if that debt was ever paid; and, if so, by whom, and under what circumstances.

Answer. It was paid by the city, I think, under an arrangement made between the railway company and the city, the exact terms of which I can't now state; but they will be found in an ordinance of the city on that subject.

Question 5. Please state whether, before that arrangement was made, and demands had been made by the insurance company of the railroad company for the payment of the debt, and whether any proceedings were threatened in case of its non-payment; if so, what.

Answer. The insurance company had requested the railroad company to pay the debt many times, and we informed them unless some
325 arrangement was made we would sell the collaterals in our hands.

Question 6. Please state, if you know, what was the market value of

those city bonds at that time, and what they could have been sold for if a sale had been made.

Answer. I do not think it can be said they had a market value at that time. The bonds might perhaps have been sold for 15 to 20 cents on the dollar.

Question 7. Please state, if you know, how many bonds had been issued by the city of New Albany in payment of its subscription of stock to the railroad company.

Answer. I think the amount was $200,000.

Question 8. Do you know whether or not the railroad company had at that time any available means, except these city bonds, to pay the debt of the Ohio Insurance Company?

Answer. I know of no other means, unless it might have been some real estate bonds that she may have had an interest in at the time.

326 Question 9. Do you know the number of real estate bonds she had an interest in at that time, and what amount of money could have been produced by the sale of those bonds?

Answer. I can't say precisely, but I think in the neighborhood of $25,000. They were worth, I believe, from 20 to 30 cents on the dollar.

Question 10. Do you know what was done by the railroad company with those bonds?

Answer. They were given over to certain parties to repay or secure them in certain moneys they had to pay for the railroid company, so far as I remember, which were other debts than the one heretofore spoken of.

Question 11. Do you know the condition of the railroad company at that time, and whether any portion of its railroad was ever completed?

Answer. The financial condition of the company was very bad, and no portion of the road was ever completed.

327 Question 12. Do you know what became of the city bonds pledged to the Ohio Insurance Company as collateral, and the other bonds which had been issued by the city?

Answer. I believe the bonds were surrendered to the city in pursuance of the arrangement, 193 of them; they were bonds for $1,000 each.

Question. Please state whether or not the 193 bonds thus returned to the city could at that time, or in any reasonable time thereafter, have been sold by the railroad company; and, if so, how much could they have been sold for?

Answer. I don't think they could have been sold for more than enough, if enough, to pay the debt of the Ohio Insurance Company.

Question 14. State whether or not those bonds could have been disposed of in any other way more advantageously in the interest of the railroad company or its creditors; and, if so, in what way.

Answer. I do not think they could at and about that time.

328 Question 15. Did you appear for any of the parties in what is called the Lindley suit, tried before Judge Jewett in the Floyd circuit court in January or February, 1868?

Answer. I did appear for myself and for several other defendents as attorney in that suit.

Question 16. Do you know of any verbal agreement as to the issues or the admission of evidence during the trial of that suit? If so, what was it? Please give all the circumstances.

Answer. I know that Judge Burke offered, and I believe did file some bonds, and perhaps an answer, which I think was afterwards withdrawn and some other paper filed in its stead with the bonds. I cannot state

positively. It was claimed on the part of the defense that we had a right to answer his complaint, or whatever it was he filed with the bonds. According to my recollection some arrangement was made, and the trial progressed with. What that arrangement was I don't remember. According to my recollection it was made in relation to the admission of evidence, and made in open court, but by whom I can't state.

329 At this point the cross-examination began:

Question 1. During the trial of that cause, did you hear any question made or discussed in court as to whether the real estate bondholders had received from the railroad company the real estate mentioned in the mortgage in full payment in satisfaction of their judgments or bonds against the company?

Answer. I have no recollection of hearing anything of that sort when I was there, and I don't think any such question was made in court, for I was there nearly all the time. I was absent part of the time. I heard no proof of that sort that I recollect of.

JOHN S. DAVIS.

The said George V. Howk, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by defendants' counsel:

Question 1. Please state if you was present at the trial of what was called the Lindly suit in the Floyd circuit before Judge Jewett
330 in January or February, 1868; and, if so, if you know of any verbal agreement as to the issues or evidence to be introduced made by the parties during that trial; and, if so, what was the agreement, and state all the circumstances?

(Objected to by plaintiffs' attorney.)

Answer. I was present during that trial as attorney for some of the defendants claiming title to parts of the premises in controversy in that case. After the trial had progressed some time, Judge Burke, on behalf of himself and the other complainants in this court, filed several answers and cross-complaints in the said Lindley case, setting up therein that he and they were severally the owners of the real estate bonds secured by the mortgage then sued on. As attorney for a portion of the defendants whom I represented, I then asked for time to prepare their answers to said cross-complaint; and in response to a suggestion that I could plead nothing but the general denial under oath, I stated that I desired to plead payment. It was then agreed, in order to save time, that all proper matters of defense might be given in evidence without the
331 same having been pleaded. This agreement was made in open court, and without objection from any of the parties interested in the case, or their counsel, and was acted upon in the introduction of evidence without objection on the further trial of the cause. This agreement was made by the parties and attorneys present, Judge Burke being present as counsel for himself and other parties.

Cross-examined by plaintiffs' attorney:

Question 1. Who did you appear for in the Lindley case?

Answer. For Mary M. Fitch, David H. Cadwalder, James Montgomery, Cassander Weir, and the heirs and administrators of W'm M. Weir, deceased, and there may have been others, but I cannot recollect without reference to the records. The parties whos interests I was really aiming to protect in the suit were Mary M. Fitch, David H. Cadwalder,

and Cassander Weir, who were severally the owners of parts of the mortgaged premises.

Question 2. Is it not true that this conversation you allude to occurred after I filed the first answer that I filed in that case, and that those
332 cases were afterwards withdrawn, and the case tried without any reference to them.

Answer. My recollection is decidedly to the contrary. I have no doubt, so far as I was concerned in the case, that the trial of the case progressed and was concluded under the provisions of the agreement referred to in my answer to the first question by defendants.

GEORGE V. HOWK.

The said Stevenson Burke being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said case, deposes as follows:

Examined by defendants attorney:

Question 1. Please state what interest you claim on your own behalf in the Pepin judgment set out in your bill of complaint, and when and how you acquired such interest.

Answer. I claim the interests that belonged to E. Dewitt, R. C. Dewitt, Sarah Coit Day, Samuel J. Andrews and wife, and A. H. Mass. I acquired these interests in the fall and winter of 1867 by purchase and written assignments.

333 Question 2. How much have you paid or have agreed to pay on account of such purchase and assignment? If you have already paid anything in cash, state how much.

(Objected to on ground of immateriality.)

Answer. I bought four of the bonds, standing in the name of R. C. Dewitt first. I paid in cash for them within a few dollars of $1,200 00, and released an interest in a mortgage which I considered of considerable value, but its actual cash value I cannot determine; it was a mortgage of indemnity. The other bond represented by R. C. Dewitt I paid about $300 00 for. The shares owned by Elijah Dewitt, (he owned seven shares,) I paid $3,500 00 for. The share owned by Mass I paid $300 for, and there was some expense connected with it, amounting to five or ten dollars more, which I paid. The bonds belonging to Sarah Coit Day and Samuel J. Andrews and wife were purchased of them by Mr. Heman Ely and assigned by them to me; I paid $200 00 in cash and exchange upon the draft, and was to attend to the litigation
334 in the Lindley case, the sale of the real estate here, free of any charge to Mr. Ely upon his shares. There were eight bonds in all belonging to Mrs. Day and Mrs. Andrews. I took the above assignments of judgments subject to all risks, and unpaid taxes and assessments upon the real estate, and subject to the existing litigation at that time. The consideration above specified covered not only their interests in the judgments or bonds above specified, but also their interests in the real estate held by Heman Ely.

On cross-examination:

Question. State any other matter or thing you may know connected with said case.

Answer. I purchased all of said shares and interests before I ever came to New Albany or saw any of the real estate held by Ely. I purchased upon the representations of others and because I wanted a little

outside business to occupy my leisure time, being at that time on the bench as judge of the court of common pleas and district court in Ohio, and having considerable leisure time, some of the transfers were
335 made to me after I first visited New Albany, but the propositions to buy and transfer were agreed upon before. I came to New Albany some five or six times in connection with the trial of the Lindley case, sometimes remaining here but a short time, and then other times for a week or more. I found a considerable amount of unpaid taxes upon the real estate, amounting in all, with street improvement tax, to about $2,500. Each time I came I had to come a distance of near or quite four hundred miles. The whole of the real estate held by Ely and represented by 47 bonds I do not believe to be worth more than fifteen thousand dollars in cash above taxes and expenses of making deeds. I am well acquainted with all of said property, and have very full information as to its value by conversation with others. I wish to say that I was present during the trial of the Lindley case, and that I do not remember the conversation or agreement named by Judges Howk and Smith in their depositions of their real estate so represented by Ely. I own $\frac{21}{47}$ths under said purchase and assignments.

336 (Objected to by defendants.) STEVENSON BURKE.

STATE OF INDIANA, *Floyd County, sct:*

I, W'm J. Hisey, a notary public within and for said county and State, hereby certify that the above Thomas L. Smith, James Montgomery, John S. Davis, George V. Howk, and Stevenson Burke was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the said cause; that their depositions were for the most part reduced to writing by me, and what part of them was not written by me was written by others by the consent of all the parties; that the said Heman Ely and others, adverse parties, and plaintiffs in this suit, appeared by Stevenson Burke, their attorney; that the said depositions were taken at the law office of Kerr and Ghormley, in the city of New Albany, Floyd County, Indiana, by consent of parties, between the hours of 8 o'clock a. m. and 5 o'clock p. m. of each of the following days, commencing Tuesday, April 20th, 1869, and adjourning from day
337 to day, Sunday, April 25th, excepted, until this date.

In testimony whereof I have hereunto set my hand and affixed my official seal this 26th day of April, 1869.

[SEAL.] WILLIAM J. HISEY,
Notary Public.

No. 2.

Schedule of property covered by original mortgage.

Number.		Description.	Value.		
	1	Lots 1 & 2, Lower Water st..	1,000	H. Ely	1,000
		Mount Isham plat ....No. 43			
		" " " " 44			
48, 49,		" " " " 45	2,000		2,000
50, 66,	2	" " " " 46		J. S. McDowell.....	
67, 68,		" " " " 47			
69, 70,		" " " " 48			
71.		" " " " 49	400		
		" " " " 50			

43, 44, 45, 46, 47, 61, 62, 63, 64, 65.	3	" " " " 66	500	H. Ely	2,500	
		" " " " 67				
		" " " " 68				
	4	" " " " 61	800			
		" " " " 62				
		" " " " 63				
		" " " " 64				
		" " " " 65	800			
		" " " " 69				
		" " " " 70				
338		" " " " 71				
	5	Noys & Chris. plat 41	500	H. Ely	500	
		" " " 42				
		" " " 43				
		" " " 44				
		" " " 45				
	6	S. ½ lot 26, 30 feet front	200	J. L. Davis	955	
	7	W. ¼ S. E. qr., sec. 6, 80 acres	368	Sold.		
	8	Uper 1st street No. 1	3,000	H. Ely	3,000	
		" " " " 3				
		" " " " 5				
	9	½ lot 28 Uper 4th street	200	Pepin, p'r Myers	200	
	10	Branch street lot 2	200	Pepin, p'r Culbertson	200	
		" " " 3				
	11	20 acres 142 perches	1,550	H. Ely	1,550	
	12	Tract of land, 1¼ acres	91	Sold.		
	13	Spring street No. 53	1,300	J. Montgomery	1,300	
		" " " 55				
		" " W. ¼, 57	1,500			
	14	Lot 27, Illinois grant, 11 96-100 A	1,200	J. Montgomery	1,500 00	
	15	E. ½ S. E. qr., sec. 33, 30 acres	540	Sold.		
	16	Scott street No. 1	400	McDonald	90 00	
		" " " 2		J. Montgomery	90	
		" " " 3		Kerr	100	
		" " " 4		Pepin	100	
339	17	Jackson street 10	700	H. Ely		
		" " 11		H. Ely		
		" " 12		T. L. Smith		
		" " 13		Pepin, p'r Noys		
		" " 14		J. Montgomery		
		" " 15		H. Ely	308	
		" " 16		H. Ely		
		" " 17		H. Ely		
		" " 18		H. Ely		
	18	Block 7, White Hill tract	2,500	H. Ely	2,500 00	
	19	Part lot 2, Lower Water st	1,000	H. Ely	1,000	
	20	W. ½ lot 8, on State st	5,000	T. L. Smith	5,000	
	21	P't N. W. sec. 10, 17 acres	2,100	H. Ely	2,100	
	22	Poplar street No. 17	57	Sold.		
		" " 18	51			
		" " 19	50			
		" " 20	51			
		" " 21	50			
		" " 22	26 50			
		" " 23	50	Pepin, p'r Noys	45	
		" " 24	50			
	23	Elm street 30		H. Ely	75	
		" " 31	300	H. Ely	75	
		" " 32	300	H. Ely	75	
		" " 33		H. Ely	75	
		" " 34		Pepin, p'r Noys	75	
		" " 35		Pepin, p'r Noys	75	
		" " 36		W. M. Weir	75	
		" " 37		T. L. Smith	75	
340	24	Shipping street 25	75	H. Ely	75 00	
		" " 26	75	H. Ely	65 00	
		" " 27	75	Pepin, p'r Noys	75 00	
		" " 28	24 50	Sold.		
		" " 29	31 50	"		
	25	39 f't front on Lower High st	1,300	H. Ely	1,300	
	26	N. ¼ N. E. qr., sec. 34, 80 A	7,000	Pepin	7,000	
	27	P't letter H, in No. 42, 15 63-100 A	4,700	T. L. Davis	4,700	
	28	½ p't out-lot No. 15, 6 52-100 A	1,000	T. L. Davis	1,200	
	29	N. ½ lot 27, Upper 1st st	1,000	H. Ely	1,000	
	30	N. ½ lot 2, on State st	800	H. Ely	800	
	31	Lots in Clark & Elkers' plat	1,500	T. L. Davis	2,075	

341 *Schedule of property covered by second mortgage.*

	1	158 ft on Upper 6th st	1,000	McDonald & Mann	1,000
	2	10 acres of No. 50, Clarksville plat		Montgomery & Davis	225
	3	Out-lot 2, 1st range out-lots	4,500	H. Ely	4,500
	4	No. 14, W. 8 N. plat	100	T. L. Davis	200
	5	Lower 7th st.....No. 12			
		14			
		16			
		17			
		18			
		19			
		20	1,600	H. Ely	1,600
		21	1,600	H. Ely	1,600
		22			
		23			
		24			
		25			
		26			
	6	Evans st.....No. 15			
		17			
		23			
		25	1,300	H Ely	1,300
		27			
		29			
		S. 10 ft.....No. 19			
	7	Upper Vincenes st.... " 49	75	Pepin, p'r Noys	35
		Anderson lot	800	Pepin, p'r Noys	1,005
					11,465

Amount of Ely's property, $26,998.

342 Pleas before the honorable the judge of the Floyd circuit court, continued and held by adjournment at the court-house in the city of New Albany, on the 18th day of February, 1868.

Present, Hon. George A. Bickwell, judge.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company, John P. Putnam, Herman Ely, Stevenson Burke, Herman Ely, executor of the will of C. Arthur Ely, deceased, John N. C. Wilson, and others.

Be it remembered that heretofore, to wit, on the 19th day of February, 1863, the plaintiff, by James and Alfred B. Collins, his at-
343 torneys, filed his complaint herein; which reads in the words and figures following, to wit:

State of Indiana, Floyd County, in the Floyd circuit court, of April term, 1863.

WILLIAM LINDLEY, PLAINTIFF,
vs.
WALTER MANN, JOHN S. DAVIS, THOMAS L. Smith, Charles B. Applegate, James Montgomery, John S. McDonald, William B. Lent, Michael C. Kerr, Robert M. Weir, Andrew B. Weir, Sarah A. Weir, Trevanion T. Weir, Samuel R. Weir, Cassandra Weir, Mary R. Weir, John S. Weir, Susan C. Weir, The New Albany and Sandusky City Junction Railroad

Company, William S. Pearson, jr., Harvey Seymour, John P. Putnam, Samuel J. Anderson, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Victor A. Pepin, defendants.

The said plaintiff, who sues for himself and for all others holding bonds similar in character to the three held by him of the 110 hereinafter named, complains of the defendants, and charges that
344 heretofore, to wit, on the 20th day of September, 1854, the said defendant The New Albany and Sandusky City Junction Railroad Company made their certain one hundred and ten bonds for the payment of one thousand dollars each, with coupons attached, and numbered from one to one hundred and ten, inclusive; that, of said 110 bonds, he, the said plaintiff, holds and owns three, with their interest warrants attached, said three bonds bearing the numbers 4, 5, and 7, copies of which are herewith filed and prayed to be taken as a part of this complaint; that, to secure the payment of said 110 bonds, the railroad company on the same day, to wit, the 20th day of September, 1854, executed to the said William S. Pierson and Harvey Seymour a mortgage in trust; that said railroad company made an additional agreement with said Seymour and said Pierson, in relation to said bonds, on the 7th day of October, 1854; the said mortgage was duly recorded in the Floyd County recorder's office on the 20th day of September, 1854, and said supplemental agreement was duly recorded on the 7th day of October, 1854, in the recorder's office of Floyd County; copies of said mortgage and said supplemental agreement, duly certified, are herewith filed and prayed to be taken as a part of this complaint; that said railroad company, by said mortgage and supplemental agreement, mortgaged to said
345 Pierson and Seymour a large quantity of lands in trust for the payment of said bonds, which lands lie in said county of Floyd, and are particularly described in said mortgage and supplement: that in 1855 said railroad company failed to meet its interest warrants, and on the day of October, 1862, said plaintiff caused the coupons of the three bonds, of which he is the owner, to be presented at the counter of the People's Bank of the City of New York, payment of which was then and there refused for want of funds. He further charges that said Pierson and Seymour are not residents of the State of Indiana, and have ceased to give any attention whatever to the duties of their said trust, tho' they had fully accepted the same, and agreed to execute it, as appears on the face of said bonds, and so said plaintiff charges that he has now the right to demand the sale of said mortgaged lands to satisfy his said bonds and the interest thereon, as no part thereof has been paid, but the whole amount remains unpaid. The said plaintiff further charges that Sarah A. Weir, Samuel R. Weir, Mary R. Weir, John S. Weir, and Susan C. Weir are minors, under the age of 21 years, for whom he prays your honor to appoint a guardian ad litem herein.

He charges that he is informed and believes that said other defendants, besides said Seymour and Pierson, claim some interest herein, and therefore he makes them defendants hereto. He prays that
346 said several defendants may be summoned to answer this complaint, and that said lands may, by order of this court, sold by said trustees or otherwise, and enough of the proceeds applied to the payment of said three bonds and interest; that the amount of his said bonds may be ascertained, and he recover judgment therefor to the

amount of seven thousand dollars, for which he demands judgment and all other proper relief.

J. AND A. B. COLLIN,
Attorneys for Plaintiff.

The bonds Nos. 4, 5, and 7, mentioned in said complaint, and made a part thereof, read in the words and figures following, to wit:

United States of America, State of Indiana.

No. 4. $1,000.

One thousand dollars.

The New Albany and Sandusky City Junction Railroad Company acknowledges that it owes, upon the sale of this bond, one thousand dollars, which sum said company promises to pay to John S. Yelverton, or bearer, at the People's Bank in the City of New York, on the first day of January, one thousand eight hundred and sixty-five, and also the interest thereon at the rate of seven (7) per centum per annum, semi-annually, on the first days of July and January in each year from the date hereof, on the presentation of the annexed interest warrants at said bank until the said principal sum shall be paid. And said company also agrees that the holder of this bond shall have
347 the privilege of converting it into twenty shares, of fifty dollars each, of the capital stock of said company, upon delivering it with the unpaid coupons to the secretary, at the office of said company, in exchange for such stock at any time within five years from the date hereof. And said company also agrees that all rights and benefits arising hereupon may be transferred by general or special endorsement, or by delivery, as if the same was a note of hand, payable to bearer, and hereby waives all benefit from valuation or appraisement laws.

In testimony whereof the said company has caused its corporate seal to be hereto attached, and these presents to be subscribed by its president, and countersigned by its secretary, this twentieth day of September, one thousand eight hundred and fifty-four.

J. MONTGOMERY, *President.*

Countersigned:
THOMAS L. SMITH, *Secretary.*

The undersigned trustees hereby certify that the New Albany and Sandusky City Junction Railroad Company has conveyed to us by deed, bearing date the twentieth day of September, 1854, the real estate described in a schedule, accompanying the same, in trust for the use and benefit of the holders of the above bond and one hundred and
348 nine others of a similar tenor, effect, and amount, with power to sell said lands on default of payment of said bonds, or interest warrants, or either of them, and pay the same out of the proceeds of said real estate, which is situated in the State of Indiana, was taken by said company for stock, and has been appraised to be of the value of one hundred and fifty-four thousand eight hundred and fifty-five dollars, as by reference to said deed of trust, which has been duly recorded in the counties where said lands are situated, will more fully and at large appear.

Dated at New York, September 30th, 1854.

WILLIAM S. PIERSON,
HARVEY SEYMOUR,
Trustees.

$35. *Interest warrant.* No. 20.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank, in the city of New York, on the first day of January, 1865, thirty-five dollars, interest due on real estate bond No. 4.

THO'S L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 19.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank, in the city of New York, on the first day of July, 1864, thirty-five dollars, interest due on real estate bond No. 4.

THOMAS L. SMITH, *Secretary.*

349 $35. *Interest warrant.* No. 18.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank, in the city of New York, on the first day of January, 1864, thirty-five dollars, interest due on real estate bond No. 4.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 17.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank, in the city of New York, on the first day of July, 1863, thirty-five dollars, interest due on real estate bond No. 4.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 16.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank, in the city of New York, on the first day of January, 1863, thirty-five dollars, interest due on real estate bond No. 4.

THOMAS L. SMITH, *Secretary.*

(Endorsed:)
New Albany and Sandusky City Junction Railroad Company real estate bond No. 4. One thousand dollars. Interest seven per cent., payable July 1st and January 1st, and redeemable in New York January 1st, 1865.

350 The undersigned, president and secretary of the New Albany and Sandusky City Junction Railroad Company, do hereby certify that the within bond was issued by due authority of law, and said company is bound for the payment thereof, with the interest coupons thereto attached, without any relief from valuation or appraisement laws, and that they are duly authorized to sell the same in or out of this State for the best price they can obtain.

They further certify that this bond is secured by deed of trust to William S. Pierson, jr., and Harvey Seymour, upon real estate lying in the State of Indiana, which said company holds by good title free and clear of any incumbrances whatever, and is believed upon strict exami-

nation of all the records and deeds relating thereto, and is in our opinion, amply sufficient to pay this bond, and all other bonds secured by said deed of trust.

Witness our hands, at New Albany, Indiana, this twentieth day of September, 1854.

J. MONTGOMERY, *President.*
THOMAS L. SMITH, *Secretary.*

(The bonds numbers 5 and 7 are the same No. 4, with the exception of the numbers.)

The copies of mortgage in trust and supplemental agreement, mentioned in said complaint and made a part thereof, read in the words and figures following, to wit:

351 This mortgage is set forth in record of Victor A. Pepin vs. the New Albany and Sandusky City Junction Railroad Company et al., offered in evidence by the complainants.

Upon the filing of said complaint and exhibits the following summons issued, to wit:

The State of Indiana to the sheriff of Floyd County, greeting:

We command you summon Walter Mann, John S. Davis, Thomas L. Smith, Charles B. Applegate, James Montgomery, John S. McDonald, William B. Lent, Michael C. Kerr, Robert M. Weir, Cassandra Weir, Mary R. Weir, John S. Weir, Susan C. Weir, and the New Albany and Sandusky City Junction Railroad Company, impleaded with William S. Pierson, jr., Harvey Seymour, John P. Putnam, Samuel J. Anderson, and others, if they be found in your bailiwick, personally to appear before the honorable Floyd circuit court, on the second day of the next term thereof, to be holden at the court-house in the city of New Albany on the 4th Monday of April, 1863, then and there to answer the complaint of William Lindley; and of this writ make due service and return.

Witness William W. Tuley, clerk of said court, and the seal thereof affixed, at the court-house, in New Albany, this 19th day of February, 1863.

[L. S.] W'M W. TULEY, *Clerk.*

[50 R. S. 50.]

352 Upon said summons the sheriff made the following return, to wit:

Served on the within-named Walter Mann, John S. Davis, Thomas L. Smith, Charles B. Applegate, John S. McDonald, William B. Lent, Michael C. Kerr, Robert M. Weir, Cassandra Weir, Mary R. Weir, John S. Weir, Susan C. Weir, by reading to them in their presence and hearing, and on John C. Childs, secretary of the New Albany and Sandusky City Junction Railroad Company. The within-named James Montgomery not found in my bailiwick.

April 4th, 1865.

STEWARD SANDFORD,
Sheriff F. C.
By GEORGE W. JONES, *Deputy.*

And upon the filing of said complaint the following publication was made, to wit:

State of Indiana, Floyd County, sct., in the Floyd circuit court, April term, 1863.

WILLIAM LINDLEY
vs.
WILLIAM S. PIERSON, JR., HARVEY SEYMOUR, John P. Putnam, Samuel J. Anderson, Sarah C. Day, Elijah De Witt, Rollin C. De Witt,
353 George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Victor A. Pepin, impleaded with Walter Mann, Samuel H. Patterson, John S. Davis, Thomas L. Smith, Charles B. Applegate, James Montgomery, John S. McDonald, William B. Lent, Michael C. Kerr, Robert M. Weir, the New Albany and Sandusky City Junction Railroad Company, and others.

On this 19th day of February, 1863, the plaintiff, by James and Alfred B. Collins, esqrs., his attorneys, filed his complaint herein, and also an affidavit, from which it appears that a cause of action exists herein against said defendants; that said cause of action relates to real estate; and that they are not residents of the State of Indiana. Therefore the said William S. Pierson, jr., Harvey Seymour, John P. Putnam,
354 Samuel J. Anderson, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Victor A. Pepin, implead as aforesaid, are hereby notified of the pendency of this action, and that the same will stand for trial at the next term of said court, to be holden at the court-house in the city of New Albany, on the fourth Monday of April, A. D. 1863.

Test: WILLIAM W. TULEY, *Clerk.*

Office of the New Albany Daily and Weekly Ledger, newspaper of general circulation, printed and published in Floyd County, Indiana, and that the annexed advertisement in the case of Lindley vs. Pierson and others was published three consecutive weeks in said newspaper, commencing on the 25th day of February, 1863; and further says not.

L. G. MATHEWS.

Subscribed and sworn to before me this 28th day of April, 1863.

W. W. TULEY, *Clerk.*

And afterwards, to wit, at the April term of said Floyd circuit court, on the 12th day of May, 1863, comes the plaintiff by James Collins and Son, his attorneys, and the defendant Victor A. Pepin appears by R. Crawford and Sons, his attorneys, and is ordered to answer the complaint.

And he files his answer thereto; which answer reads in the words and figures following, to wit:

355 Floyd circuit court.

WILLIAM LINDLEY
vs.
SANDUSKY RAILROAD COMPANY AND OTHERS.

Victor A. Pepin, for answer to the complaint in this action, adopts

the answer of his co-defendants, John P. Putnam and others, and says that the matters therein contained are true in manner and form as the same are therein alleged. Therefore he prays judgment.

CRAWFORD AND SON, *P. D.*

And the defendants William Pierson and Harvey Seymour appear by their attorneys Smith and Kerr, and are ordered to answer the complaint, and they file their answer thereto; which answer reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
WILLIAM S. PIERSON, HARVEY SEYMOUR, AND others.

Said William S. Pierson and Harvey Seymour, for separate answer to the plaintiff's complaint herein, say:

That at the October term of this court, in the year 1857, one Victor A. Pepin instituted an action in said court against these respondents and the other parties named in his complaint in said action upon cer-
356 tain of the bonds secured by the mortgage in the plaintiff's complaint in this suit mentioned, among which were the three identical bonds now sued upon, and praying for the foreclosure of said mortgage and a sale of the mortgaged premises for the payment of the same. Such proceedings were had in said former suit that the holders of all the bonds issued by said railroad company, and secured by said mortgage, said bonds being one hundred and ten in number, and for the payment of $1,000 each, with interest warrants, appeared and filed their answers; and issues being joined thereon, said court, at said term, rendered a judgment for the foreclosure of said mortgage, and the sale of all said mortgaged property for the payment of the debts found to be due to the several holders and owners of said bonds. A copy of said judgment is filed herewith and made part hereof.

Afterwards the said Charles Frederick, the commissioner appointed by said court to make sale of said mortgaged premises, pursuant to said judgment, did, on the 30th of March, 1858, sell said premises, and at the April term of said court, in the year 1858, made his report in writing to said court of the sale thereof, a copy of which report is filed herewith and made part thereof.

Afterwards, at the same term of said court, approved and confirmed said sale and ordered said commissioners to make conveyance to said purchasers of said mortgaged premises for the portions purchased
357 by them respectively, a copy of which order of confirmation by said court is also filed herewith and made part hereof.

Said sale included all the property secured by said mortgage, and all of it was conveyed by said commissioner to the purchasers mentioned in his said report of sale; and all the proceeds of said sale, after payment of the costs and charges, was duly applied to satisfaction of said several mortgaged debts specified in said judgment.

These respondents therefore say that they have fully performed all the duties of their said trust, and have been discharged therefrom; and they pray to be hence dismissed with their reasonable costs.

SMITH AND KERR,
Attorneys for Pierson and Seymour.

This answer was amended at October term, 1863.

Amended answer afterwards filed, and the defendants John P. Putnam, Samuel J. Anderson, Sarah C. Day, Elijah De Witt, Rollin C. DeWitt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, Thomas L. Smith, Michael C. Kerr, and the New Albany and Sandusky City Junction Railroad Company, appears by Smith and Kerr, their attorneys, and are ordered to answer the complaint; and they file their answer thereto.

The defendant Cassandra Weir, senior, appears by Robert M. Weir, her attorney, and waives the issuing and service of process herein, and is ordered to answer the complaint; and it is shown to the court
358 by the sheriff's return that the summons herein was personally served upon the defendants Sarah A. Weir, Cassandra Weir, Mary R. Weir, John S. Weir, and Susan C. Weir more than ten days before the first day of the present term of this court; and it is also shown to the court that they are all infants; whereupon George N. Hawk, esqr., is appointed their guardian ad litem and is ordered to answer the complaint. The defendants John S. McDonald and Walter Mann appear by their attorneys Crawford and Son, and are ordered to answer the complaint, and they file their answer thereto; which answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
SANDUSKY CITY RAILROAD COMPANY.

John S. McDonald and Walter Mann answer the complaint and aver that all the matters set out in the answer of his co-defendants Putnam and others are true in manner and form as they are therein alleged.

Wherefore they pray judgment.

CRAWFORD AND SON, *P. D.*

And the defendants Samuel H. Patterson, William B. Lent, Charles B. Applegate, and John S. Davis, their attorney, and file their demurrer to the complaint; which demurrer reads in the words and figures following:

359 WILLIAM LINDLEY
vs.
WILLIAM S. PIERSON, JR., AND OTHERS.

Samuel H. Patterson, William B. Lent, Charles B. Applegate, and John S. Davis, four of said defendants, demur to the plaintiff's complaint for the reasons following:

First. That said complaint does not state facts sufficient to constitute a valid cause of action.

DAVIS,
Attorney for Defendants.

Which demurrer is overruled by the court, and said last-named defendants are again ordered to answer the complaint.

And the defendants Lent, Applegate, and Davis file their joint answer; which reads in the words and figures following, to-wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
SANDUSKY CITY JUNCTION RAILROAD COMPANY and others.

William B. Lent, John S. Davis, Charles B. Applegate, and Samuel H. Patterson, for answer to the complaint in this case, adopt the answer of their co-defendants John P. Putnam and others, and say that the matters therein contained are true in manner and form as the
360 same are therein alleged; when, &c.

DAVIS, *for Defendants.*

And the defendant Samuel H. Patterson files his seperate answer to said complaint; which reads in the words and figures following, to wit:

In the Floyd circuit court, April term, 1863.

WILLIAM S. LINDLEY
vs.
SANDUSKY CITY JUNCTION RAILROAD COMpany and others.

Samuel H. Patterson, one of said defendants, for answer to said plaintiff's complaint in this suit adopts the answer of his co-defendants John G. Putnam and others, and says the matters therein contained are true in manner and form as the same are therein alleged. And in addition thereto the said defendant further says Mary M. Fitch, who is now living in this county, is interested by deed in the lands named in said mortgage, she having become a purchaser of part of said lands from one who purchased at said sale by said commissioner. A copy of said deed by said commissioner, and also a copy of said deed to said Fitch, will be filed herewith if required. This defendant, therefore, says that said Fitch should be made a defendant in this suit; wherefore, &c.

DAVIS, *Attorney for Def't.*

And the plaintiff files his demurrer to all the special defenses herein except so much of the answer of said defendant Patterson as
361 avers that Mary M. Fitch has an interest in this suit, and ought to be made a party defendant hereto; which demurrer reads in the words and figures following, to wit:

WILLIAM LINDLEY
vs.
NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, Harvey Seymour, William S. Pierson, and others.

And the said plaintiff demurs to the answers of said Seymour, Pierson, Railroad Company, John P. Putnam, Samuel J. Anderson, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles A. Ely, Augustus H. Moss, Tho's L. Smith, Michael C. Kerr, Victor A. Pepin, John S. McDonald, W'm B. Lent, Charles B. Applegate, John S. Davis, Walter Mann, and others, and for cause sets down—

1. That the same do not state facts sufficient to constitute a good defense to his said complaint.

J. AND A. B. COLLINS,
For Plaintiff.

And said demurrer is sustained by the court, and leave is given to amend said special defenses. And thereupon all the defendants except James Montgomery being before the court, this cause is ordered to be continued for process as to the said James Montgomery, with leave to plaintiff to amend his complaint by making Mary M. Fitch a party
362 defendant hereto; and the defendant Cassandra Weir, sr., and George V. Howk, guardian ad litem, are ordered to answer the complaint on or before the calling of the cause at next term.

And afterward, to wit, at the April term of said Floyd circuit court, on the 26th day of April, 1864, comes the plaintiff by James and A. B. Collins, his attorneys, and files his affidavit herein, stating that this action is in relation to real estate, and to enforce a lien; that William J. Parsons is a necessary party thereto; that a cause of action exists herein against him; and that said William J. Parsons is not a resident of the State of Indiana.

It is thereupon ordered by the court that the said William J. Parsons be notified, according to law, of the pendency of this action, and that the same will stand for trial at the next term of this court, to be holden at the court-house, in the city of New Albany, on the 4th Monday of October, 1864.

And afterwards, to wit, at the same term of said Floyd circuit court, on the 9th day of May, 1864, comes the plaintiff, and suggests to the court that no entry of the proceedings in this cause at the last term of this court can be found upon the order-book of this court; and, on his motion, it is ordered by the court that an entry be made nunc pro tunc as of the last term, and shewing such proceedings; and said entry is now made as follows, to wit:

363 No. 175, 4th day of the October term, 1863.

WILLIAM LINDLEY
vs.
N. A. AND S. C. J. R'ROAD COMPANY, WILLIAM S. Pierson, Harvey Seymour, and others.

Comes the plaintiff by J. and A. B. Collins, his attorneys, and it is shewn to the court, by the sheriff's return to the summons herein, that the same was personally served upon the defendants Mary M. Fitch and James Montgomery more than ten days before the first day of the present term of this court. And it is suggested to the court that said Mary M. Fitch is an infant; thereupon George V. Howk, esqr., is appointed her guardian ad litem herein, and he is ordered to answer for said infant.

And the defendants William S. Pierson and Harvey Seymour file an amended answer herein, and also file the exhibits referred to in said answer, and marked Nos. 1, 2, 3, and 4; Exhibits No. 5, in said answer not being filed. Said amended answer and exhibits read in the following words and figures, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
WILLIAM S. PIERSON, HARVEY SEYMOUR, AND others.

364 Said William S. Pierson and Harvey Seymour for their sep-

arate amended answer to the plaintiff's compaint herein say that, at the October term of this court, in the year 1857, one Victor A. Pepin filed his complaint in this court against these defendants, together with the New Albany and Sandusky City Junction Railroad Company, James Montgomery, John S. Davis, William M. Weir, John S. McDonald, Thomas L. Smith, John B. Windstandley, Samuel H. Patterson, Charles Bowman, Charles Howard, and Sebra Howard, a copy of which complaint, marked "Exhibit No. 1," is filed herewith, and made part hereof.

Said Pepin, in said complaint, averred that he was the owner and holder of seventeen of the bonds secured by the mortgage in the plaintiff's complaint in this suit mentioned, copies of which bonds were filed and made part of said complaint.

Said complaint further averred that said Montgomery, Lent, Davis, Smith, McDonald, Winstandley, Weir, Patterson, Bowman, Charles Howard, and Sebra Howard were the holders and owners of all the other bonds specified, amounting altogether, with those held by said Pepin, to the whole number of bonds issued, to wit, one hundred and ten, and prayed for the foreclosure of said mortgage and a sale of the mortgaged premises for the payment of the same. Said bonds—and held by said Pepin—nor copies thereof, alleged in said complaint to be filed therewith, are not now on file in said court, and cannot be
365 found, and copies thereof cannot now be furnished by these respondents.

But these respondents aver that all said bonds and coupons issued by said railroad company were in the same identical words and figures as those copies of which are furnished by the plaintiff in the present suit, except that they were numbered from No. 1 to Number 110, inclusive, and among the bonds so sued upon by said Pepin were the three identical bonds now sued upon. At the same October term of said court, in the year 1857, all of said defendants to the said suit of said Pepin appeared and filed their answers to said complaint, copies of which answers are also filed herewith, marked Exhibit No. 2.

And issues being joined on said complaint and answers, said court, at said term, rendered a judgment for the foreclosure of said mortgage and the sale of all said mortgaged property for the payment of the debts found to be due to the several holders and owners of said bonds.

A copy of said judgment, showing all the proceedings of the court in the premises, is filed herewith, Exhibits No. 3.

Afterwards the said Charles Frederick, the commissioner appointed by this court to make sale of said mortgaged premises, pursuant to said judgment, did, on the 30th of March, 1858, sell said premises, and at the April term of said court, in the year 1858, made his report, in writing, to said court, of the sale thereof, a copy of which report is filed
366 herewith, marked Exhibits No. 4.

Afterwards, at the same term of said court last mentioned, said court approved and confirmed said sale, and ordered said commissioner to make conveyances to the purchasers of said mortgaged premises for the portions purchased by them respectively. A copy of said order of confirmation is also filed herewith, and marked Exhibit No. 5.

Said sale included all the property secured by said mortgage, and all of it was conveyed by said commissioner to the purchasers mentioned in his said report of sale, and all the proceeds of said sale, after payment of the costs and charges, were duly applied to the satisfaction of said several mortgage debts specified in said judgment.

These respondents therefore say they have fully performed all the du-

ties of their said trust, and pray to be hence dismissed with their reasonable costs.

WILLIAM S. PIERSON and
HARVEY SEYMOUR,
By SMITH AND KERR,
Their Attorneys.

The exhibits referred to in this answer appear in the record of Victor A. Pepin vs. The New Albany and Sandusky City Junction Railroad Company, offered in evidence by complainants.

And the defendants John P. Putnam, Samuel T. Anderson,
367 Sarah C. Day, Elijah Dewitt, George A. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith file their amended answer and cross-complaint herein, and also file Exhibit No. 7 mentioned in said answer, Exhibit No. 8 mentioned in said answer.

Said amended answer and cross-complaint, with "exhibits" filed therewith, read in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
WILLIAM S. PIERSON, HARVEY SEYMOUR, John P. Putnam, and others.

Said John P. Putnam, Samuel T. Anderson, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith, for answer to the plaintiff's complaint, say that the matter stated in the answer of their co-defendants William S. Pierson and Harvey Seymour, as amended herein, are true, and they adopt and make said answer a part of this answer of these respondents.

In addition to the matters stated in said amended answer of said Pierson and Seymour, these respondents say that at the sale made by said commissioner, pursuant to said judgment mentioned in said answer of their said co-defendants, these respondents, apprehending that said mortgaged premises might be sacrificed for want of buyers at a
368 reasonable price, entered into a written agreement with the persons therein named, empowering Michael C. Kerr and Victor A. Pepin to purchase at said sale such parts of said property as they should deem proper for the joint benefit of all the parties to said agreement. A copy of said agreement is filed herewith and marked Exhibit No. 7.

Pursuant to said agreement said Pepin and Kerr, as such trustees, did purchase at said sale certain portions of said mortgaged premises, and, pursuant to said order of said court confirming said sale, said commissioner executed to them a deed of conveyance therefor, which was duly examined and approved by said court.

A copy of said deed is filed herewith and marked Exhibit No. 8.

Afterwards, at the October term of this court, in the year 1858, one of these respondents, the said Herman Ely, instituted an action of partition against the other respondents herein and the other persons who were [who were] parties to the agreement shown by Exhibit No. 7, to obtain partition of the lands so purchased by said Pepin and Kerr as such trustees, and a decree was rendered by this court in said action

partitioning said lands amongst these respondents and the other parties named in said agreement. These respondents have applied to the clerk of said court for the files in said partition suit, but said clerk, after making diligent search of the records of the clerk's office of
369 this court, found that they were not there on file and could not be found, and therefore copies thereof and of all the proceedings in said partition suit cannot be furnished by these respondants.

By said decree there were partitioned to the said Herman Ely, for the use and behoof of himself, John P. Putnam, Samuel T. Anderson, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Charles Arthur Ely, and Augustus H. Moss, as their proportion of said property, the following parts and parcels of the property described in said mortgage mentioned in the plaintiff's complaint herein, to wit:

The parts of lots Nos. 1 and 2, Lower Water street, New Albany, 25 feet front by 108 feet deep.

The lots in Day's Mount Isham Plat, in the city of New Albany, numbered 43, 44, 45, 46, and 47, on Upper First street, and numbered 61, 62, 63, 64, and 65, on the old Vincennes road.

The lots in Noyes and Clynes' plat, in the city of New Albany, Nos. 41, 42, 43, 44, and 45, on Terry street.

The lots Nos. 1, 3, and 5, on Upper First street, in New Albany.

The tract of land known as the Wilcox Place, containing 20 acres 142 perches.

The lots in Moore's plat of Lower Albany, Nos. 10, 11, 15, 16, 17, and 18, on Jackson street.

The block No. 7, in the subdivision of the Whitehill tract in New Albany.

370 The part of lot No. 2, on Lower Water street, New Albany, being 25 feet in front by 108 feet deep.

The tract of land known as letter "C," on the map of the city of New Albany, containing 17 acres.

The lots in plat No. 20, of the city of New Albany, known as lots Nos. 30, 31, 32, and 33, on Elm st., and Nos. 25 and 26, on Shipping street.

The parts of lots Nos. 37 and 39, on Lower High street, being 39 feet front, and 90 feet deep.

The N. ½ of lot No. 27, on Upper First street, New Albany, being 25 feet in front by 120 feet deep, and the N. ½ of lot No. 2, on State in New Albany, being 25 feet in front by 120 feet deep.

By said decree there was also partitioned to the said Thou Smith, one of these respondants, lots Nos. 12, on Jackson stree No. 37, on Elm street, of Moore's plat of Lower Albany; and to tl Thomas L. Smith and William M. Weir, the north half of lot No State street, in the city of New Albany.

The said William M. Weir, during his lifetime, sold his interest i lot No. 8, on State street, to the Bank of the State of Indiana, f use of the branch at Jeffersonville; and said Thomas L. Smith ar bank, and heirs of said William M. Weir, still hold said part of s as tenants in common, the said Thomas L. Smith being the owner one undivided half part thereof. All the other lands des
371 in said Exhibit No. 8 were partitioned to the said James gomery, John S. Davis, John G. McDonald, William M. ....., Samuel H. Patterson, Charles B. Applegate, William B. Lent, and Victor A. Pepin, or their representatives or assigns.

These representatives aver that the whole of the property mortgaged

ties of their said trust, and pray to be hence dismissed with their reasonable costs.

WILLIAM S. PIERSON and
HARVEY SEYMOUR,
By SMITH AND KERR,
Their Attorneys.

The exhibits referred to in this answer appear in the record of Victor A. Pepin vs. The New Albany and Sandusky City Junction Railroad Company, offered in evidence by complainants.

And the defendants John P. Putnam, Samuel T. Anderson,
367 Sarah C. Day, Elijah Dewitt, George A. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith file their amended answer and cross-complaint herein, and also file Exhibit No. 7 mentioned in said answer, Exhibit No. 8 mentioned in said answer.

Said amended answer and cross-complaint, with "exhibits" filed therewith, read in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
WILLIAM S. PIERSON, HARVEY SEYMOUR, John P. Putnam, and others.

Said John P. Putnam, Samuel T. Anderson, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith, for answer to the plaintiff's complaint, say that the matter stated in the answer of their co-defendants William S. Pierson and Harvey Seymour, as amended herein, are true, and they adopt and make said answer a part of this answer of these respondents.

In addition to the matters stated in said amended answer of said Pierson and Seymour, these respondents say that at the sale made by said commissioner, pursuant to said judgment mentioned in said answer of their said co-defendants, these respondents, apprehending that said mortgaged premises might be sacrificed for want of buyers at a
368 reasonable price, entered into a written agreement with the persons therein named, empowering Michael C. Kerr and Victor A. Pepin to purchase at said sale such parts of said property as they should deem proper for the joint benefit of all the parties to said agreement. A copy of said agreement is filed herewith and marked Exhibit No. 7.

Pursuant to said agreement said Pepin and Kerr, as such trustees, did purchase at said sale certain portions of said mortgaged premises, and, pursuant to said order of said court confirming said sale, said commissioner executed to them a deed of conveyance therefor, which was duly examined and approved by said court.

A copy of said deed is filed herewith and marked Exhibit No. 8.

Afterwards, at the October term of this court, in the year 1858, one of these respondents, the said Herman Ely, instituted an action of partition against the other respondents herein and the other persons who were [who were] parties to the agreement shown by Exhibit No. 7, to obtain partition of the lands so purchased by said Pepin and Kerr as such trustees, and a decree was rendered by this court in said action

partitioning said lands amongst these respondents and the other parties named in said agreement. These respondents have applied to the clerk of said court for the files in said partition suit, but said clerk, after making diligent search of the records of the clerk's office of
369 this court, found that they were not there on file and could not be found, and therefore copies thereof and of all the proceedings in said partition suit cannot be furnished by these respondants.

By said decree there were partitioned to the said Herman Ely, for the use and behoof of himself, John P. Putnam, Samuel T. Anderson, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Charles Arthur Ely, and Augustus H. Moss, as their proportion of said property, the following parts and parcels of the property described in said mortgage mentioned in the plaintiff's complaint herein, to wit:

The parts of lots Nos. 1 and 2, Lower Water street, New Albany, 25 feet front by 108 feet deep.

The lots in Day's Mount Isham Plat, in the city of New Albany, numbered 43, 44, 45, 46, and 47, on Upper First street, and numbered 61, 62, 63, 64, and 65, on the old Vincennes road.

The lots in Noyes and Clynes' plat, in the city of New Albany, Nos. 41, 42, 43, 44, and 45, on Terry street.

The lots Nos. 1, 3, and 5, on Upper First street, in New Albany.

The tract of land known as the Wilcox Place, containing 20 acres 142 perches.

The lots in Moore's plat of Lower Albany, Nos. 10, 11, 15, 16, 17, and 18, on Jackson street.

The block No. 7, in the subdivision of the Whitehill tract in New Albany.

370 The part of lot No. 2, on Lower Water street, New Albany, being 25 feet in front by 108 feet deep.

The tract of land known as letter "C," on the map of the city of New Albany, containing 17 acres.

The lots in plat No. 20, of the city of New Albany, known as lots Nos. 30, 31, 32, and 33, on Elm st., and Nos. 25 and 26, on Shipping street.

The parts of lots Nos. 37 and 39, on Lower High street, being 39 feet front, and 90 feet deep.

The N. ½ of lot No. 27, on Upper First street, New Albany, being 25 feet in front by 120 feet deep, and the N. ½ of lot No. 2, on State street, in New Albany, being 25 feet in front by 120 feet deep.

By said decree there was also partitioned to the said Thomas L. Smith, one of these respondants, lots Nos. 12, on Jackson street, and No. 37, on Elm street, of Moore's plat of Lower Albany; and to the said Thomas L. Smith and William M. Weir, the north half of lot No. 8, on State street, in the city of New Albany.

The said William M. Weir, during his lifetime, sold his interest in said lot No. 8, on State street, to the Bank of the State of Indiana, for the use of the branch at Jeffersonville; and said Thomas L. Smith and said bank, and heirs of said William M. Weir, still hold said part of said lot as tenants in common, the said Thomas L. Smith being the owner of the one undivided half part thereof. All the other lands described
371 in said Exhibit No. 8 were partitioned to the said James Montgomery, John S. Davis, John G. McDonald, William M. Weir, Samuel H. Patterson, Charles B. Applegate, William B. Lent, and Victor A. Pepin, or their representatives or assigns.

These representatives aver that the whole of the property mortgaged

by said railroad company to secure the payment of said bonds and coupons, as stated in the plaintiff's complaint herein, were not worth more than thirty-four thousand dollars, and was entirely insufficient to pay said bonds, which were one hundred and ten in number, for one thousand dollars each, with the coupons attached in addition thereto.

These respondants never received anything in payment of said railroad company, on account of the decree rendered by said court, as shown by Exhibit No. 3, filed with the answer of their co-defendants Pierson and Seymour, except the lands herein aforesaid described, and the balance of said decree in their favor respectively remains wholly unpaid; and said railroad company is wholly insolvent, and has no property out of which said balance or any part thereof can be made.

These respondants further say that, at the time of the rendition of said decree, they filed in this court all of the said bonds, being fifty-eight in number, with the coupons attached, upon which said decree was rendered, in their favor respectively, and all of said bonds still remain on file in this court.

372 But the bonds owned by said Pepin, among which were the identical three bonds now sued upon, are not now on file in this court; and if the same have come to the hands of the present plaintiff, it has been by the negligence or fraud of said Pepin, and not from any negligence or fraud by these respondants.

The respondants aver that they acquired said portions of said mortgaged premises, so partitioned to them respectively as aforesaid, in good faith, and for a full and valuable consideration, and without any notice whatever of the claim of the plaintiff in this action to any of the bonds secured by said mortgage.

They claim that if any of said mortgaged property should be subjected to the payment of said bonds in the hands of the plaintiff, it should be the property acquired by said Pepin or his assigns.

These respondants further aver that the bonds which at the time of said decree were owned and held by said Montgomery, Davis, McDonald, Weir, Patterson, Applegate, and Lent, and upon which said decree was rendered in their favor respectively, are not now on file in this court, and if they were filed, have been since withdrawn from the custody of this court, and may get into the hands of parties who will again claim the payment thereof.

The respondants make this answer a cross-complaint against the plaintiff and their said co-defendants, and pray they may be severally required to answer hereto; and these respondants further pray that on the final hearing hereof, they may be dismissed with their

373 reasonable costs; and that the plaintiff and their said co-defendants be required to produce and file the said bonds upon which said decree was rendered in this court, in order that the same may be cancelled and prevented from being again put in circulation, and in default thereof, that all claims of any person or persons into whose hands any of said bonds may come, be ordered to be satisfied out of said portions of said mortgaged property acquired by said owners of said bonds which have been thus wrongfully put in circulation.

They also pray for all other proper relief.

SMITH AND KERR,
P. Resp'ts.

The defendant John S. McDonald files a further answer and cross-complaint; which reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
NEW ALBANY AND SANDUSKY RAILROAD COMpany and others.

John S. McDonald answers the complaint herein, and denies all the allegations therein contained; and, by way of cross-complaint against the plaintiff and his co-defendants, the said McDonald says that he is the owner and holder of the bonds mentioned in the mortgage described, numbered 57, 58, 59, 60, 61, together with the interest warrants
374 thereto attached, which said bonds and warrants are now due and wholly unpaid, and are herewith filed and made part hereof.

Whereof the said McDonald prays judgment for ten thousand dollars, the foreclosure of said mortgage, and the sale of the real estate therein described, or so much as may be necessary to satisfy the debt of said McDonald, and all other proper relief.

R. CRAWFORD AND SON,
Attorneys for McDonald.

The bonds and warrants mentioned in said answer and cross-complaint read in the words and figures following, to wit:

(The bonds numbers 58, 59, 60, and 61 are the same as No. 57, with the exception of the numbers.)

The defendant James Montgomery appears by Howk and Weir, his attorneys, and files his answer and cross-complaint. Said answer and cross-complaint reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE SANDUSKY CITY JUNCTION RAILROAD Company and others.

Said James Montgomery, seperately answering the complaint herein, says that he denies specifically each and every allegation contained in said complaint.

2nd. And, by way of cross-complaint against the plaintiff and
375 his co-defendants herein, said Montgomery says he is the holder and owner of six (6) of the real estate bonds mentioned in and secured by the mortgage described in said complaint, and the coupons or interest warrants attached to said bonds, all of which remain unpaid.

Said bonds are respectively numbered 44, 45, 46, 47, 48, and 108, and are herewith filed and made part hereof.

Wherefore said James Montgomery demands judgment for ten thousand dollars, and the foreclosure of said mortgage, and the sale of the property or so much thereof as may be necessary to pay his debts, and for all other proper relief.

HOWK AND WEIR,
Attorneys for Montgomery.

The bonds and warrants mentioned in said answer and cross-complaint read in the words and figures following, to wit:

(The bonds numbers 45, 46, 47, 48, and 108, are the same as No. 44, with the exception of the numbers.)

The defendant Robert M. Weir, adm'r, appears by Howk and Weir, his attorneys, and files his answer and cross-complaint; which reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company et al.

376 Robert M. Weir, administrator of the estate of William M. Weir, deceased, seperately answering the complaint herein, says that he denies specifically each and every allegation in said complaint contained.

2nd. And, by way of cross-complaint against the plaintiff and his co-defendants herein, said Robert M. Weir says that, as such administrator, he is the holder and owner of five (5) of those real estate bonds mentioned and secured by the mortgage described in plaintiff's complaint and of the coupons or interest warrants attached to said bonds; all of which remain unpaid.

Said bonds are numbered 62, 63, 64, 65, and 66, and are herewith filed and made part hereof.

Therefore said Robert M. Weir, administrator as aforesaid, demands judgment for eight thousand five hundred dollars, and the foreclosure of said mortgage, and the sale of the property, or so much thereof as may be necessary to pay his debts, and all other proper relief.

HOWK AND WEIR,
Attorneys for said Weir.

The bonds mentioned in the above answer and cross-complaint read in the words and figures following, to wit:

(The bonds numbers 63, 64, 65, and 66 are the same as No. 62, with the exception of the numbers.)

377 And the defendants Sarah A. Weir, Samuel R. Weir, Mary A. Weir, John S. Weir, and Susan C. Weir appear by George V. Howk, their guardian ad litem, and file their answer; which answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company et al.

The defendants Sarah A. Weir, Samuel R. Weir, Mary R. Weir, John S. Weir, and Susan C. Weir, who are infants under the age of twenty-one years, by George V. Howk, their guardian at litem, answer the complaint herein, and say that they deny specifically each and every allegation of said complaint prejudicial to their interests.

GEORGE V. HOWK,
Guardian ad litem.

The defendant Cassandra Weir appears by Howk and Weir, her attorneys, and files her seperate answer; which answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company and others.

Said Cassandra Weir, seperately answering the complaint
378 herein, says that [that] she denies specifically each and every allegation of said complaint.

2nd. And, for further answer herein, the said Cassandra Weir says that Jacob Goodfried, John M. Leib, David H. Cadwalader, Howell Wells, William P. Swift, A. E. S. Smith, Madison Royer, James Lucas, Morris McDonald, William J. Parsons, John E. Noyes, Michael Clynes, Morris Demoor, John C. Culbertson, Simpkins Love, Caroline Love, John B. Jones, The Bank of the State of Indiana, for the use of the branch at Jeffersonville, were at and before the commencement of this action, and are still, the owners in fee-simple of divers parts of the premises described in the mortgage mentioned in plaintiff's complaint by deeds duly recorded in the recorder's office of the county in which said mortgaged premises are situate before the commencement of this action; that the said several persons have an interest in the subject-matter of this controversy adverse to the plaintiff; and that they are necessary parties to a complete determination and settlement of the questions involved in this action.

Wherefore this defendant asks that the several persons herein named may be made parties defendant to this action, and other proper relief.

HOWK AND WEIR,
Attorneys for Cassandra Weir.

The defendant Henry Crawford files his answer and cross-complaint; which reads in the words and figures following, to wit:

379 WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Railroad Co. and others.

Henry Crawford answers the complaint and admits all the allegations therein contained to be true.

2. And, by way of cross-complaint against the plaintiff and his co-defendants, said Crawford says that he is the owner and holder of 16 of the bonds in the mortgage in the complaint described, numbered 67, 68, 69, 70, 71, 24, 25, 26, 27, 28, 110, 43, 54, 55, 56, 109, together with the interest warrants thereto attached; which bonds and interest warrants are now due and unpaid, and are herewith filed and made part hereof.

Wherefore the said Crawford prays judgment for twenty-five thousand dollars, the foreclosure of said mortgage, and the sale of the real estate therein described, or so much as may be necessary to satisfy the debt of said Crawford, and all other proper relief.

R. CRAWFORD AND SONS,
Attorneys for H. Crawford.

The bonds and warrants mentioned in the foregoing answer and cross-complaint read in the words and figures following, to wit:

(The bonds numbers 68, 69, 70, 71, 24, 25, 26, 27, 28, 110, 43, 54, 55, 56, and 109 are the same as No. 67, with the exception of the numbers.)

380 The defendants Lent, Patterson, Davis, and Applegate file their answer and cross-complaint; which reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE SANDUSKY CITY JUNCTION RAILROAD Company and others.

Said William B. Lent, Samuel H. Patterson, Charles B. Applegate, and John S. Davis, defendants herein, by way of amended answer herein to the complaint of said plaintiff, say that they adopt the amended answer of their co-defendants, John P. Putnam and others, and state that the matters therein contained are true in manner and form as the same are therein alleged.

And said defendants further state that John B. Jones, who resides in the city of Pittsburg, P'a, and who is now living; Sarah Spurrier, who is the wife of George B. Spurrier, and who resides in Floyd County, in the State of Indiana; and the Ohio Insurance Company, of which company James M. Haines has been duly appointed receiver, and who resides in Floyd County, are interested in said lands named in the mortgage referred to in said plaintiff's complaint, said parties having respectively become the purchasers of parts of said lands, and have deeds therefor, and they are necessary parties to this suit, &c.

JOHN S. DAVIS,
Att'y "for Def'ts."

381 And the said plaintiff and defendants are ordered respectively to answer each of said cross-complaints.

The defendant William B. Lent files his answer to the cross-complaint of Henry Crawford; which reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company and others.

William B. Lent, one of the defendants to the cross-complaint of Henry Crawford, says:

First. That he denies the matters contained in said cross-complaint, and every part thereof.

Second. And, by way of further and second paragraph herein, said defendant says that the mortgage named in said plaintiff's complaint was, at the October term of this honorable court for the year

1857, foreclosed for the purpose, in part, of paying the bonds named in said Crawford's complaint in a certain suit wherein one Victor A. Pepin was plaintiff and William S. Pierson and Harvey Seymour and others were defendants; that in said suit the holders and owners of said bonds, to wit, Charles B. Applegate, John S. Davis, and this de-
382 fendants, interposed seperate answers to said complaint of said Pepin, setting up the bonds, respectively held and owned by them, being the same bonds now filed by said Crawford; and such proceedings were had, in said case in said court, that, by consideration of said court, judgment was rendered upon said bonds, with the other bonds issued by said company, and said mortgaged property was ordered to be sold by said court, in part, to pay the identical bonds in said Crawford's complaint mentioned, and Charles Frederick was appointed by the order of said court, in said case, a commissioner to make sale of said mortgage property; and said commissioner did make sale of said property, and sundry parties became purchasers thereof at said sale; and deeds were made to said parties for the lands by them purchased; all of which was afterwards reported to said courts, and was, in all things, by said court, approved and affirmed.

A copy of the judgment of said court, also a copy of the report of said commissioner, and the order of said court confirming the same, are filed herewith and made part hereof.

Said defendant further states that it appears that said bonds were not actually placed in the hands of the clerk of this court, but a description thereof was given, together with the numbers of said bonds, and for safety said bonds were left in the vault of the Ohio Insurance Company, in the case of one Charles B. Applegate, who was the secretary of said company, to be by him handed to the clerk of
383 this court when the judgment should be rendered upon said bonds; that the amount of each bond was furnished to said court, and judgment was taken as hereinbefore stated upon said bonds, and, through some error or forgetfulness of said Applegate, said bonds were permitted to remain in said vault of said Ohio Insurance Company until said company suspended business, when, by some process unknown to this defendant, said bonds got into the hands of said Crawford, and are now in his possession, and are filed with his cross-complaint. Defendant states that said Crawford was well aware that said mortgage had been foreclosed, in part, to pay the identical bonds now named in his complaint, and that the lands described in said mortgage had been sold, in part, to pay said bonds, and that said bonds rightfully belonged to the files in this court in said case of Victor A. Pepin against William S. Pearson, Harvey Seymour, and others; and that said Applegate, Davis, and this defendant had no right to said bonds, or any of them, as said bonds had been used in said suit as above stated.

Defendant further states that himself, said Davis, and said Applegate, under said sale and certain other proceedings afterwards had, became the owners of a certain part of the real estate named in said mortgage, all of which has been long since sold to innocent purchasers, of all which said Crawford had notice.

And defendant further states that, in case the proceedings of
384 said Lindley herein should [should] be successful, said bonds ought to be held in good faith for the use and benefit of the innocent purchasers of said lands from defendant Applegate and Davis.

And the defendant makes this his answer herein a cross-complaint against said Crawford, and prays that he may be required to answer

the same, and that he be required to give up and surrender said bonds to the clerk of this court, that they may be filed with the other papers, and files in the case of said Victor A. Pepin against William S. Pierson, Harvey Seymour, and others, where said bonds rightfully belong; and said defendants asks for all other and proper relief in the premises.

WILLIAM B. LENT,
By JOHN S. DAVIS, *His Attorney.*

(The copy of the judgment report of commissioner and order of the court confirming the same, filed with the foregoing answer, cannot be found amongst the files.)

The plaintiff files his seperate demurrers to the answer of the defendants Pepin; the first answer of McDonald and Mann; the seperate answer and cross-complaint of Henry Crawford; the amended answer of Pierson and Seymour; the answer and cross-complaint of Lent, Patterson, Applegate, and Davis; and the amended answer and cross-complaint of John P. Putman, and the ten others who answer with him. Said demurrers read in the words and figures following, to wit:

385 WILLIAM LINDLEY
vs.
N. A., S. C. J. R. R. CO., VICTOR A. PEPIN, AND others.

And the said plaintiff demurs to the answer of Victor A. Pepin, and for cause—

1. That the same does not set forth matters sufficient to constitute a good defense against his said complaint.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

WILLIAM LINDLEY
vs.
THE N. A. AND S. C. J. R. R. CO., JOHN S. McDonald, and Walter Mann and others.

And the said demurrer to the answer of John S. McDonald, and Walter Mann, and for cause—

1. That the same does not set forth matter sufficient to constitute a good bar to the plaintiff's cause of action.

J. AND A. B. COLLINS,
Attorneys for Plaintiffs.

WILLIAM LINDLEY
vs.
THE N. A. AND S. C. J. R. R. CO., THOMAS L. Smith, John S. McDonald, and others.

And the said plaintiff, as to the answer of John S. McDonald, de-
386 murs thereto, and for cause—

1. That said answer does not contain matter sufficient to bar the plaintiff herein.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

WILLIAM LINDLEY
vs.
THE N. A. AND S. C. J. R. R. Co., W'M S. PEARSON, and Harvey Seymour and others.

And the said plaintiff, as to the amended answer of said Piarson and Seymour, demurs thereto, and for cause—

1. That the same does not contain matter sufficient to constitute a good defense against his complaint herein.

J. AND A. B. COLLINS,
Att'ys for Pl'ff's.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, William S. Pierson, John S. Davis, William B. Lent, and others.

And the said plaintiff, as to so much of the answer of said W'm B. Lent, Samuel H. Patterson, Charles B. Applegate, John S. Davis as adopts the answer of John P. Putnam and others, demurs thereto, and for cause—

387 1. That said part of said answer does not contain matter sufficient to bar this plaintiff of his said action.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

WILLIAM LINDLEY
vs.
JOHN P. PUTNAM, SAMUEL J. ANDERSON, Sarah C. Day, and others.

And, as for the answer, amended answer, and cross-complaint of John P. Putnam, Samuel Anderson, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith, as also the answer of Michael C. Kerr and the New Albany and Sandusky City Junction Railroad Company, the said plaintiff demurs, and for cause—

1. That the same do not contain matter sufficient to constitute a good defense to the said plaintiff's complaint.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

And thereupon this cause is ordered to be continued with leave to plaintiff to amend his complaint by making new parties defendant.

And here ends the nunc pro tunc order for October term, 1863.

And afterwards, to wit, at the April term of said Floyd circuit court, on the 9th day of May, 1864, comes the plaintiff by his counsel,
388 and shows to the court that since the last term he has amended his complaint by making Jacob Godfried, John M. Leib, David H. Cadwalader, Howell Wells, William P. Swift, A. , E. L. Smith, Madison Royer, James Lucas, Morris McDonald, William J. Parsons, John E. Noyes, Michael Cynes, William Demar, John C. Culbertson, Simpkins Love, Caroline Love, John B. Jones, Sarah Spurrier, George B. Spurrier, James M. Haines, receiver of the Bank of the State of Indiana,

for her Jeffersonville branch, and John Sloan parties defendant hereto; and that he has further amended by avering the death of said John M. Leib and making his children and heirs at law parties defendant, to wit, Margaret Leib, and Wilhelmina, Mary Ann, Matilda, John M., Elias, Elizabeth, and Oscar Leib defendants hereto.

And it is shown to the court by the sheriff's return that all of said heirs and representatives were personally served with the summons herein more than ten days before the first day of the present term of this court, and that they are all infants except Margaret Leib, Wilhelmina Leib, and Mary Ann Leib, and said defendants, the Leibs, fail to appear; and thereupon the complaint herein is taken as confessed against the said Margaret, Wilhelmina, and Mary Ann, and George V. Howk is appointed guardian ad litem for the said Matilda, John M., Elias, Elizabeth, and Oscar, and is ordered to answer.

389 And it is shown to the court that all of the other defendants made parties to by said amendment since last term have been personally served with the summons herein more than ten days before the first day of the present term of this court.

Thereupon the demurrers filed by the plaintiff to the answers and cross-complaint at the last term of this court are submitted to the court, and said demurrers are overruled, and to the decisions of the court overruling said demurrers the plaintiff excepts.

Thereupon the plaintiff files his reply to the answer of the defendant Pepin, with interrogatories to be by him answered under oath; which reads in the words and figures following, to wit:

WILLIAM LINDLEY
vs.
NEW ALBANY AND SANDUSKY CITY J. R. R. CO., Victor A. Pepin, Harvey Seymour, and others.

And, for reply to the special answer of said Pepin, said plaintiff says he denies each material allegation thereof.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

Interrogatories put by said plaintiff to said Pepin, to be by him answered under oath.

390 1. Are you the same Victor A. Pepin who was plaintiff in a proceeding in the Floyd circuit court, in the State of Indiana, to enforce a mortgage or trust-deed against Harvey Seymour, W'm S. Pierson, and the New Albany and Sandusky City Junction Railroad Company, and others?

2. When you commenced that proceeding, did you have in your possession, or under your control, or were you the owner of, three of the bonds of said railroad company, numbered 4, (four,) 5, (five,) and 7, (seven,) with the interest warrants attached; or were you the owner thereof, or had you then your possession, or under your control at any time since, or had you then in court at the hearing of said cause?

3. Had you previously to commencing your suit to enforce the collection of the bonds you held any knowledge of any of said bonds being in the possession of and owned by William Lindley, the plaintiff? And, if you had, please furnish the numbers if you can.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

And the defendant David H. Cadwalader appears by D. W. Lafallette, his attorney, and is ordered to answer. And the plaintiff files his affidavit for publication as to William J. Parsons; and thereupon publication is ordered to be made as to the said William J. Parsons by the clerk of this court, and the defendant Pepin is ordered to answer said interrogatories on or before the next calling of this cause at next term, until which time this cause is ordered to be continued.

391 And afterwards, to wit, at the October term of said Floyd circuit court, on the 5th day of November, 1864, come now the parties heretofore appearing in the cause, and William J. Parsons, by Smith and Kerr, his attorneys, and on motion he is ordered to answer the plaintiff's complaint herein.

And thereupon said Parsons filed his answer herein; which reads in words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
NEW ALBANY AND SANDUSKY CITY JUNCTION R. R. Co. et al.

William J. Parsons, one of the defendants herein, says he is the owner of lots numbered 43, 44, 45, 46, and 47, in Day's Mount Isham plat; also lots numbered 61, 62, 63, 64, and 65, in the same plat; also lots numbered 10, 11, 15, 16, 17, and 18, on Jackson street, in N. Moore's plat of Lower Albany, all in the city of New Albany, and all being a portion of the lands covered by the mortgage in the plaintiff's complaint mentioned.

This defendant purchased all of said property of his co-defendants, John P. Putnam and others, long after the rendition of the decree, and the sale of the same under the execution issued thereon mentioned in the answers of Harvey Seymour, William S. Pierson, and John P. Putnam and others, filed in this suit for a full and valuable con-

392 sideration, and without any notice of the matters mentioned in the plaintiff's complaint, and in the full belief that his said co-defendants had obtained a good title thereto by said decree and sale. He adopts the answers of his co-defendants herein to the complaint of the plaintiff as fully and completely as if the facts therein contained were now herein repeated and set out, and avers that all said facts are true.

And having thus fully answered, he prays that his rights be protected and that he be hence dismissed with his reasonable costs.

WILLIAM J. PARSONS,
By SMITH AND KERR, *His Att'ys.*

And on his motion a rule is awarded against the plaintiff to reply thereto.

And Virgil D. Stockbridge files his answer and cross-complaint herein; which reads in the words and figures following, to wit:

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY RAILroad Co., and others.

1. Virgil D. Stockbridge answers the complaint of the plaintiff, and admits all the allegations therein contained to be true.

2. And, by way of cross-complaint against the plaintiff and his co-defendants, said Stockbridge says that he is the owner and holder of 14 of the bonds described, numbered 1, 2, 3, 6, 8, 9, 10, 11, 13, 19,
393 20, 21, 22, 23, together with the interest warrants thereto attached, which bonds and interest warrants are now due and unpaid, and are herewith filed and made a part hereof.

Wherefore the said Stockbridge prays judgment for twenty-five thousand dollars, the foreclosure of said mortgage, and the sale of the real estate therein described, or so much as may be necessary to satisfy the debt of said Stockbridge, and all other proper relief.

R. CRAWFORD AND SONS,
Attorneys for Virgil D. Stockbridge.

The bonds and interest warrants mentioned in the foregoing answer and cross-complaint read in the words and figures following, to wit:

(The bonds numbers 2, 3, 6, 8, 9, 10, 11, 13, 19, 20, 21, 22, and 23 are the same as number 1, with the exception of the numbers.)

And on his motion a rule is awarded against the plaintiff and the several co-defendants of said Stockbridge to answer said cross-complaint, and Mary M. Fitch, by her guardian ad litem, files her answer herein; which answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, William S. Pierson, Harvey Seymour, et al.

394 Said Mary M. Fitch, an infant under the age of twenty-one years, by George V. Howk, her guardian ad litem, seperately answers the plaintiff's complaint, and says that she denies specifically each and every allegation in said complaint contained which is prejudicial to her interests.

GEORGE V. HOWK,
Guardian ad litem.

And said Mary M. Fitch, by her said guardian ad litem, answers the cross-complaint of Henry Crawford, on file herein, and says that she denies specifically each and every allegation in said cross-complaint contained which is prejudicial to her interests.

GEORGE V. HOWK,
Guardian ad litem.

And said Mary M. Fitch, by her said guardian, seperately answers the cross-complaint of Robert M. Weir, administrator of the estate of William M. Weir, deceased, on file herein, and says that she denies each allegation in said cross-complaint contained which is prejudicial to her interests.

GEORGE V. HOWK,
Guardian ad litem.

And said Mary M. Fitch, by her said guardian, seperately answers the cross-complaint of James Montgomery, on file herein, and says that

she denies specifically each allegation in said cross-complaint con-
395 tained which is prejudicial to her interests.

GEORGE V. HOWK,
Guardian ad litem.

And said Mary M. Fitch, by her said guardian, seperately answers the cross-complaint of John S. McDonald, on file herein, and says that she specifically denies each allegation in said cross-complaint contained which is prejudicial to her interests.

GEORGE V. HOWK,
Guardian ad litem.

And said Mary M. Fitch, by her said guardian, seperately answers the cross-complaint of Virgil D. Stockbridge, on file herein, and says that she denies specifically each allegation in said cross-complaint contained which is prejudicial to her interests.

GEORGE V. HOWK,
Guardian ad litem.

And on her motion a rule is awarded against the plaintiff and all cross-complainants to reply thereto. And the infant defendants Wilhelmina Leib, Mary Ann Leib, Matilda Leib, John M. Leib, Elias Leib, Elizabeth Leib, and Oscar Leib, by George V. Howk, their guardian ad litem, files their answer to the complaint herein and all the cross-complaints; said answer reads in the following words and figures, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
396 THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company, and others.

The said Wilhelmina Leib, Mary Ann Leib, Matilda Leib, John W. Leib, Elias Leib, Elizabeth Leib, and Oscar Leib, by George V. Howk, their guardian ad litem, for answer to the plaintiff's complaint, and all the cross-complaints filed herein, say that they deny each and every material allegation in said complaint and in said cross-complaints, and demand strict proof thereof.

GEORGE V. HOWK,
Guardian ad litem for Infant Heirs of John M. Leib.

And the infant defendants Sarah A. Weir, Susannah R. Weir, Mary R. Weir, John S. Weir, and Susan C. Weir, by George V. Howk, esqr., their guardian ad litem, file their answer to all the cross-complaints herein Said answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

The said defendants Sarah A. Weir, Samuel R. Weir, Mary R. Weir,

John S. Weir, Susan C. Weir, by George V. Howk, their guardian ad litem, for answer to all the cross-complaints filed herein, say that
397 they deny each and every material allegation in said cross-complaints prejudicial to their interests.

GEORGE V. HOWK,
Guardian ad litem for Infant Heirs of W'm M. Weir.

These parties, Sam'l I. Kelley, Simkins Love and Caroline Love, John B. Jones, Geo. B. Spurrier & wife, respectively filed their answers, but the same not being deemed material in this cause are omitted by consent of parties from this record.

And the defendant, D. H. Cadwalader, files his answer to the complaint, and his answer to all cross-complaints. Said answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company et al.

David H. Cadwalader seperately answers the plaintiff's complaint and all cross-complaints on file in this action, and says that he specifically denies each and every allegation in said complaint and cross-complaint, or either of them, contained.

2nd. And, for further answer to said complaint and cross-complaint, said Cadwalader says that he adopts the amended answer of his co-defendants William S. Pierson and Harvey Seymour as a part of this answer, and avers that the matters stated in said amended answer are true.

398 And this defendant further says that, at the sale mentioned in said Pierson and Seymour's amended answer, he became the purchaser of that portion of the premises described in the mortgage mentioned in plaintiff's complaint which is known as thirty acres of the east half of the southeast quarter of section 33, in township 2 south, of range 6 east, in Floyd County, Indiana, for the sum of $540 00, which was the full value thereof at that time, and in its then condition; that said sale to this defendant was afterwards approved and confirmed by this honorable court; and that said premises were conveyed to this defendant by deed duly executed, a copy of which is filed herewith and made part hereof.

And this defendant says that he took immediate possession of said premises under his said deed, and has ever since owned and held the same; and that he has made valuable and lasting improvements on said premises, whereby the value of said premises has been largely increased, and they are now fairly worth not less than $3,000 00.

And this defendant further says that he acquired his title to the said premises in the manner aforesaid, without any notice whatever of any of the matters alleged in the plaintiff's complaint, or in any of the said cross-complaints on file herein; and he avers and charges that the plaintiff and his co-defendants had notice of all the matters alleged in said Pierson and Seymour's amended answer, at the times of their
399 several occurrences; and that innocent parties were acquiring interests in the said mortgaged premises, and making valuable

and lasting improvements thereon, with the full belief that all the proceedings mentioned in said amended answer were, as they appear to be, regular and valid. And yet the plaintiff, and the defendants who have filed cross-complaints herein, did not, nor did either of them, for a long time, to wit, for five years, assert or endeavor to enforce any claim under said mortgage, although during all of said time, as they and each of them well knew, the said New Albany and Sandusky City Junction Railroad Company was notoriously insolvent and utterly unable to pay her debts.

Wherefore this defendant asks that his rights in the premises may be protected by the decree of this honorable court, and that he may have all proper relief.

LAFALLETTE AND HOWK,
For Cadwalader.

And the plaintiff is ordered to reply to said answer, and the defendants William B. Lent, Samuel H. Patterson, John S. Davis, and Charles B. Applegate file their joint answer to the cross-complaint of John S. McDonald, with interrogatories to said McDonald. Said answer and interrogatories read in the words and figures following, to wit:

In the Floyd circuit court, Oct. term, 1864.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION R. R. Co. et al.

400 William B. Lent, Samuel H. Patterson, John S. Davis, and Charles B. Applegate, for answer to the cross-complaint of John S. McDonald filed herein, say:

First. That they deny each and every thing in said complaint contained.

Second. And, for further answer to said cross-complaint, defendants, and each of them, say that the matter and things stated in the answer of their co-defendants Pierson and Seymour, and in the answer of John P. Putnam and others, to the complaint of the plaintiff in this suit, are true, and they here repeat the averments therein contained in answer to said cross-complaint of said McDonald as fully and completely as if the same were herein set forth and repeated.

And, in addition to the facts contained in said answer to plaintiff's complaint, defendants further say that the bonds mentioned in said cross-complaint are the identical same bonds used and sued upon by said McDonald, in said former foreclosure suit of Victor A. Pepin against the New Albany and Sandusky City Junction Railroad Company and others, and that judgment was rendered in said former suit in favor of said McDonald upon all of said bonds in said cross-complaint mentioned, and that said bonds now belong to the files in said former suit.

And said defendants further say that said mortgage having been foreclosed to pay said bonds, and judgment having been taken thereon
401 in favor of said McDonald, he has no right to use them in this suit.

Wherefore, and C.

JOHN S. DAVIS,
Attorney for Def'ts.

And said McDonald is ordered to answer said interrogatories on or before the next calling of this cause, and the same defendants last named file their joint answer to the cross-complaint of James Montgomery, with interrogatories. Said answer and interrogatories read in the words and figures following, to wit:

In the Floyd circuit court, Oct. term, 1864.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

William B. Lent, Samuel H. Patterson, John S. Davis, and Charles B. Applegate, for answer to the cross-complaint of James Montgomery filed herein, say:

First. That they deny each and every matter and thing in said complaint contained.

Second. And, for further answer to said cross-complaint, defendants, and each of them, say that the matter and things stated in the answer of their co-defendants Pierson and Seymour, and in the answer of John P. Putnam and others, to the complaint of the plaintiff in this suit, are true, and they here repeat the averments therein contained in an-
402 swer to said cross-complaint of said Montgomery as fully and completely as if the same were herein set forth and repeated.

And, in addition to the facts contained in said answers to plaintiff's complaint, defendants further say that the bonds mentioned in said cross-complaint are the identical same bonds used and sued upon by said Montgomery in said former foreclosure suit of Victor A. Pepin against the New Albany and Sandusky City Junction Railroad Company and others, and that judgment was rendered in said former suit in favor of said Montgomery upon all of said bonds in said cross-complaint mentioned, and that said bonds now belong to the files in said former suit.

And said defendants further say that said mortgage having been foreclosed to pay said bonds, and judgment having been taken thereon in favor of said Montgomery, he has no right to use them in this suit.

Wherefore, and C.

JOHN S. DAVIS,
Att'y for Def'ts.

And the defendant Robert M. Weir, administrator, files his answer to all the cross-complaints herein except his own. Said answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company et al.

403 Said Robert M. Weir, administrator of the estate of William M. Weir, deceased, answers all the cross-complaints on file herein except his own, and says he denies specifically each and every allegation in said cross-complaints, or either of them, contained.

HOWK AND WEIR,
Atty's for said Weir.

And the defendant James Montgomery files his answer to all the cross-complaints herein except his own. Said answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Co. et al.

Said James Montgomery answers all the cross-complaints on file herein except his own, and says that he denies specifically each and every allegation in the said cross-complaints, or either of them, contained.

HOWK AND WEIR,
Attorneys for Montgomery.

And the defendants John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George B. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith file their joint answer to the cross-complaint of Robert
404 M. Weir, administrator, with interrogatories to said Weirs. Said answers and interrogatories read in the words and figures, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Co. and others.

Said John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George B. Starr, Horace C. Starr, Herman Ely, Charles Atkins Ely, Augustus H. Moss, and Thomas L. Smith, for answer to the cross-complaint of their co-defendant Robert M. Weir, administrator of the estate of William M. Weir, deceased, says:

1st. They specially deny each and every averment in said cross-complaint.

2nd. And, for further answer to said cross-complaint, the defendants, and each of them, say that the matters and things stated in the answer of their co-defendants Pierson and Seymour, and in the answers of their defendants to their complaint of the plaintiff in this suit, are true, and they here repeat the averments therein contained in answer to said cross-complaint of said Weir as fully and completely as if the same were here repeated.

And, in addition to the facts stated in said answer to the plaintiff's complaint, these defendants further say that the bonds in said cross-complaint mentioned are the same identical bonds owned and used by the said William M. Weir, the plaintiff's intestate, in said
405 former suit of foreclosure, and upon which he obtained judgment of forclosure in said suit, and execution and sale of said mortgaged premises, and received his proportion of the proceeds of such sale.

After said judgment was obtained, said bonds were placed by the counsel of said William M. Weir in the office or custody of the Ohio Insurance Company for safe-keeping, and, if they were not filed in this

court or cancelled, it was his own fault, or the fault of his counsel, not the fault of these defendants.

Said William M. Weir, at the time said former suit was pending, was living, and was a member of the board of directors of said railroad company, and had full knowledge of all the proceedings had in said suit; and, if his administrator now has possession of the bonds in his cross-complaint mentioned, he obtained them fraudulently and with full knowledge of the foregoing facts.

SMITH AND KERR,
Attorneys for Respondants.

And the same defendants last named file their joint answer to the cross-complaint of Virgil D. Stockbridge, with interrogatories to him. Said answer and interrogatories read in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Co. and others.

406 Said John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus M. Moss, and Thomas L. Smith, for answer to the cross-complaint of Virgil D. Stockbridge filed herein, say:

1st. They specifically deny each and every averment in said cross-complaint.

2nd. For further answer to said cross-complaint, these defendants, and each of them, say that the matters and things stated in the answer of their co-defendants Pierson and Seymour, and in the answers of these defendants to the complaint of plaintiff in this suit, and they here repeat the averments therein contained in answer to said cross-complaint of said Stockbridge fully and completely as if the same were here repeated.

And, in addition to the matters stated in said answers to the plaintiff's complaint, these respondants further say that all of the bonds in said cross-complaint mentioned are a portion of the same identical owned and used by said Victor A. Pepin in said former suit of foreclosure, and upon which he obtained judgment in the said former suit, and execution, and sale of said mortgaged premises, and received his proportion of the proceeds of such sale.

After said judgment was obtained, said bonds were placed by the counsel of said Pepin in the office or custody of the Ohio Insur-
407 ance Company for safe-keeping, and if they were not filed in this court or cancelled it was the fault of said Pepin, and not the fault of these defendants. If said Stockbridge now has possession of the said bonds in his said complaint mentioned, he obtained them after said former judgment had been rendered upon them, and after all said mortgaged property had been sold under judgment in said former suit fraudulently and with full knowledge of the facts aforesaid.

SMITH AND KERR,
Attorneys for the Respondants.

And he is ordered to reply to said answer and to answer said interrogatories on or before the next calling of this cause.

And the same defendants file their joint answers to the cross-complaint of James Montgomery, with interrogatories to him.

Said answers and interrogatories read in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

Said John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George B. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus M. Moss, and Thomas L. Smith,
408 for answer to the cross-complaint of their co-defendant James Montgomery, say:

1st. They specifically deny each and every averment in said cross-complaint.

2nd. And for further answer to said cross-complaint, the defendants and each of them, say that the matters and things stated in the answer of co-defendants Pierson and Seymour, and in the answers of these defendants to the complaint of the plaintiff in this suit, are true, and they here repeat the averments therein contained in answer to said cross-complaint of said Montgomery as fully and completely as if the same were here repeated.

And, in addition to the facts stated in said answers to the plaintiff's complaint, these defendants further say that said bonds in said cross complaint mentioned are the same identical bonds filed by him in said former suit of foreclosure, and upon which he obtained judgment of foreclosure in said suit, and execution and sale of said mortgaged premises, and received his proportion of the proceeds of said sale.

After said judgment was obtained said bonds were placed by the counsel of said Montgomery in the office of the Ohio Insurance Company for safe-keeping, and if they were not filed in this court and cancelled it was his own fault, or that of his counsel, and not the fault of those defendants.

Said Montgomery was, at the time said former suit was pending, president of said New Albany and Sandusky City Junction Rail-
409 road Company, and had full knowledge of all the proceedings connected with said suit, and if he now has possession of the bonds in his cross-complaint mentioned he must have obtained them surreptitiously and fraudulently.

SMITH AND KERR,
Attorneys for said John P. Putnam and others.

And he is ordered to reply to said answer and to answer said interrogatories on or before the next calling of this cause.

And the same defendants their joint answer to the cross-complaint of John S. McDonald, with interrogatories to him. Said answer and interrogatories read in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND S. C. J. R. CO. AND others.

Said John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George B. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus M. Moss, and Thomas L. Smith, for answer to the cross-complaint of their co-defendant John S. McDonald, say:

1st. That they specifically deny each and every averment in said cross-complaint.

2nd. And, for further answer to said cross-complaint, these defendants and each of them say that the matters and things stated in
410 the answer of their co-defendants Pierson and Seymour, and in the answers of these defendants to the complaint of the plaintiffs in this suit, are true, and they here repeat the averments therein contained in answer to said cross-complaint of said McDonald as fully and completely as if the same were here repeated.

And, in addition to the facts stated in said answers to the plaintiff complaint, these defendants further say that said bonds in said cross-complaint mentioned are the same identical bonds owned and used by him in said former suit of foreclosure, and upon which he obtained judgment of foreclosure, and execution of sale of said mortgaged premises, and received his proportion of the proceeds of said sale.

After said judgment was obtained, said bonds were placed by the counsel of said McDonald in the office or custody of the Ohio Insurance Company for safe-keeping, and, if they were not filed in this court and cancelled, it was his own fault, or the fault of his counsel, and not the fault of these defendants.

Said McDonald, at the time said former suit was pending, was a member of the board of directors of said railroad company, and had full knowledge of all the proceedings connected with said suit, and, if he now has possession of the bonds in his cross-complaint mentioned, he must have obtained them surreptitiously and fraudulently.

SMITH AND KERR,
Att'ys for John P. Putnam & others.

411 And he is ordered to reply to said answer, and to answer said interrogatories on or before the next calling of this cause.

And the same defendants file their joint answer to the cross-complaint of Henry Crawford, with interrogatories to him. Said answer and interrogatories read in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
NEW ALBANY AND SANDUSKY CITY J. R. R. CO. and others.

Said John Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George B. Starr, Horace C. Starr, Herman

Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith, for answer to the cross-complaint of Henry Crawford filed herein, say:

1st. They deny each and every averment therein contained.

2nd. And, for further answer to said cross-complaint, these defendants, and each of them, say that the matters and things contained in the answer of their co-defendants Pierson and Seymour, and in the answer of these defendants to the complaint of the plaintiff in this suit, are true, and they here repeat the averments therein contained in answer to the cross-complaint of said Crawford as fully and completely
412 as if the same were herein again set forth and repeated.

And, in addition to the facts contained in said answers to the plaintiff's complaint, these defendants further say that a portion of said bonds mentioned in said cross-complaint, to wit, those numbered 24, 25, 26, 27, 28, and 110, are the same identical bonds owned and used by their co-defendant John S. Davis in said former suit of foreclosure; that another portion of them, to wit, those numbered 67, 68, 69, 70, and 71, are the identical same bonds owned and used, by their co-defendant William B. Lent in said former suit; and that the remainder of said bonds in said cross-complaint mentioned, to wit, those numbered 43, 54, 55, 56, and 109, are the identical same bonds owned and used by Charles B. Applegate in said former suit, and that judgment was rendered in said former suit upon all of said bonds in said cross-complaint mentioned.

And these defendants further aver that after judgment had been rendered upon said bonds, as is in their answer to the plaintiff's complaint stated, all of said bonds were placed in the vault of the Ohio Insurance Company for safe-keeping, and to be handed to the clerk of this court to be filed and cancelled, as is alleged in the answer of their co-defendant William B. Lent to the complaint of the plaintiff; that afterwards, while said bonds were still contained in said vaults, and before they had been delivered to the clerk of the [of this] court to be cancelled
413 as aforesaid, said Ohio Insurance Company failed, and its effects went into the hands of James M. Haines, who was appointed receiver of the assets of the same by this court, and said bonds were among the papers that so came into the hands of said receiver; that said Henry Crawford was attorney for said receiver, and as such receiver had access to said bonds, and by means of such access, or by some means unknown to these respondants, attained said bonds, well knowing that they were not the property of said insurance company, or of said Davis, Lent, or Applegate, but that they had already been put in suit, and that judgment had been obtained upon them as aforesaid.

These respondants further say that if there has been any negligence whereby said bonds came into the hands of said Crawford, it is not the fault of these respondants, and they pray that if any decree be rendered on said bonds, or any of them, it be confined to the property obtained by the original holders and owners of said bonds upon said foreclosure and sale of said mortgaged premises.

JOHN P. PUTNAM AND OTHERS,
By SMITH AND KERR, *Their Att'ys.*

And he is ordered to reply to said answer, and to answer said interrogatories, on or before the next calling of this cause.

And the said Henry Crawford files his reply to the answer of
414 the last-named defendants, and his answer to their interrogato-

ries; which replication reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
N. A. AND SANDUSKY CITY J. R. R. CO. ET AL.

Henry Crawford replies to the 2nd answer of John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith to the cross-complaint of said Crawford, and says that there is no such record of proceedings as is therein alleged.

2. And, for further replication to said second answer of said parties to the cross-complaint of said Crawford, he says it is not true, as is alleged in said paragraph, that said Victor A. Pepin produced and filed in this court, in the action of said Pepin against said railroad company, (17,) seventeen, secured by the mortgage herein sought to be foreclosed; but, in truth and in fact, said Pepin did not, nor did any one in his behalf, file or produce as evidence in this court, at any time in said action, said seventeen bonds, or any number of said bonds, nor any copy of said bonds, or any numbers thereof, and all said persons above named
415 were parties to said action, and bound to take notice of said facts.

Said Crawford further denies that the bonds filed with his cross-complaint, and numbered 24, 25, 26, 27, 28, and 110, are the "identical same bonds" filed by the defendant John S. Davis in said former suit for foreclosure; but alleges that, in truth and in fact, said John S. Davis never, at any time during the pendency of said action, filed in court or produced as evidence said bonds so numbered as aforesaid, or any portion of the same, nor did he, or any one in his behalf, file or produce copies thereof, and that all of the above-named parties were co-defendants with said Davis in said action, and were bound to take notice of the facts herein averred.

Said Crawford further denies that the bonds filed with his cross-complaint, and numbered 67, 68, 69, 70, and 71, are the identical same bonds filed by said William B. Lent in said former suit for foreclosure; but he alleges that, in truth and in fact, said William B. Lent, never, at any time during the pendency of said action, nor any one in his behalf, file in court, or produce in evidence, said certain bonds numbered as aforesaid, or any number of the same, or copies thereof, and all of the above-named parties were co-defendants with said Lent, and bound to take notice of the facts herein alleged.

Said Crawford further denies that the bonds filed with his
416 cross-complaint, and numbered 43, 54, 55, 56, and 109, are the identical same bonds filed by Charles B. Applegate in said former suit of foreclosure; but he alleges, in truth and in fact, said Applegate did not at any time, nor did any one in his behalf, file in court, or produce in evidence, said certain bonds, so numbered as aforesaid, or any number of the same, or copies thereof, and the above-named parties were co-defendants with said Applegate in said action, and were bound to take notice of the facts herein alleged.

And all matters further stated in said answer, the said Crawford denies each and every allegation therein contained.

R. CRAWFORD AND SON, *P. D.*

And the defendant Harvey Seymour files his answer to the cross-complaints of James Montgomery, John S. McDonald, Henry Crawford, Robert M. Weir, and Virgil D. Stockbridge. Said answer reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY J. R. R. Co. and others.

Said William S. Pierson and Harvey Seymour, for answer to the cross-complaint of James Montgomery, John S. McDonald, Henry Crawford, Robert M. Weir, adm'r, and Virgil D. Stockbridge, say:

That the matters and things stated in their answer to the com-
417 plaint of the plaintiff, filed heretofore in this suit, are true, and they now here repeat the averments therein contained in answer to each of the cross-complaints of their above-named co-defendants as fully and completely as if all said averments were now again repeated.

And having fully answered, they pray to be dismissed with their costs.

SMITH AND KERR,
Attorneys for the Respondants.

And they are ordered to reply to said answer.

And the defendant William J. Parsons files his answer to the cross-complaints last named. Said answer reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY J. R. R. Co.

Said William J. Parsons, for answer to the cross-complaint of James Montgomery, John S. McDonald, Henry Crawford, Robert M. Weir, and Virgil D. Stockbridge, says:

That the matters and things stated in his answer to the complaint of the plaintiff, heretofore filed in this suit, are true, and he now here repeats the averments therein contained, in answer to each of the cross-complaints of his above-named co-defendants, as fully and completely as if all said averments were now here again repeated.

And having fully answered he prays to be dismissed with his
418 costs, and for all other proper relief.

SMITH AND KERR,
Attorneys for Respondants.

And the last-named defendants are ordered to reply to said answer.

And the plaintiff files his replies, numbered 1, 2, 3, and 4, to the answers of the several defendants herein, and his answer to the several cross-complaints filed herein; which reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, Victor A. Pepin, William S. Pierson, and others.

And the said plaintiff, for reply to the several answers of said Pierson and said Seymour, and to the paragraphs of the answers of the several defendants herein adopting and reasserting the same, the same plaintiff says:

1. That said answers, original and amended, and as adopted and reasserted by said several defendants, are not true; that he denies the matters set forth therein, and requires proof thereof.

J. AND A. B. COLLINS,
For Plaintiff.

2nd. And for second paragraph of reply to said answers as pleaded as aforesaid said plaintiff says there is no such record of proceedings therein averred.

J. AND A. B. COLLINS,
Atty's "for Pl'ff."

419 3rd. And for 3rd paragraph for reply to said special answer said plaintiff says that said decree and order of foreclosure and sale therein referred to, and of which exhibit is made, was procured by the parties thereto by fraud and misrepresentations, in this:

That said Victor A. Pepin, in his complaint, avers that he was the holder and owner of seventeen of the bonds in the mortgage specified, and that said Pepin then filed in said court, with the interest warrants attached, said several bonds, being numbered from 1 to 17, inclusive.

And the said several defendants thereto, including said Pierson and Seymour as such trustees, appeared in said action and plead therein, as did also the other defendants thereto, setting up their several claims on account of bonds held and other demands against said trust, but did not deny or in any way traverse or bring in question the averments in said Pepin's complaint, when, in fact and in truth, the three identical bonds here sued on, with interest warrants attached thereto, were the property of this plaintiff and held by him in his possession and under his control at the time of filing said complaint by said Pepin, and at the time said cause was heard, and they had so been for a long time before the filing of said complaint by said Pepin, and so have been ever since.

And the said Pepin never did file or bring into the said court the bonds now sued upon.

420 Wherefore said plaintiff says that the parties to said suit by said Pepin for foreclosure were guilty of fraud and misrepresentations in procuring and allowing said decree to be entered when they might and should have traversed the averments of said Pepin's complaint, and required him to file in said suit the several bonds mentioned in his complaint.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

4. And as to the special matters set up in the several other paragraphs

of said defendants' answers, said plaintiff, for reply thereto, denies each and every material allegation thereof, and requires strict proof.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

And, for answer to the several cross-complaints filed herein by the several defendants, said plaintiff says he denies each and every material allegation therein.

J. AND A. B. COLLINS,
Attorneys for Pl'ff.

And the defendants Pierson and Seymour move the court to strike out the second paragraph of said reply, which motion is sustained by the court; and said paragraph No. 2 is stricken out, the plaintiff thereto at the time excepting.

And said defendants Pierson and Seymour file their demurrer to the third paragraph of said reply. The motion and demurrer above mentioned read in the following words and figures, to wit:

421 In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY J. R. R. Co. and others.

Said defendants Pearson and Seymour, John P. Putnam, and others move the court to strike out the 2nd paragraph of the reply of the plaintiff to their several answers filed herein; because said paragraph is surplusage, a general denial being pleaded in the 1st paragraph of said reply.

SMITH AND KERR,
Att'ys for Def'ts.

Said defendants also demur to the third paragraph of the said reply of the plaintiff; because the same does not state facts enough to constitute a defence to the matters stated by the said defendants in their several answers.

SMITH AND KERR,
Attorneys for Def'ts.

And said demurer is overruled by the court, these said defendants thereto at the time excepting.

And the defendant William B. Lent, by leave of court, files an additional paragraph of his answer to the cross-complaint of Henry Crawford; which reads in the words and figures following to wit:

In the Floyd circuit court, October term, 1864.

WILLIAM LINDLEY
vs.
422 THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company and others.

William B. Lent, one of the defendants herein, by way of additional

paragraph to his former answer filed herein to the cross-complaint of Henry Crawford, says:

That the matters and things stated in the answer of John P. Putnam and others to the plaintiff's complaint, heretofore filed in this suit, are true, and they now here repeat the averments therein contained in answer to each of the cross-complaints above named as fully and completely as if all said averments were now again repeated.

JOHN S. DAVIS,
Attorney for Def't.

And the defendants Patterson, Davis, and Applegate file their joint answer to the cross-complaint of said Crawford; which reads in the words and figures following, to wit:

In the Floyd circuit court, Oct. term, 1864.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

Said John S. Davis, Samuel H. Patterson, and Charles B. Applegate, in answer to the cross-complaint of Henry Crawford herein, say:

That the matters and things stated in the answer of John P.
423 Putnam and others to the plaintiff's complaint, heretofore filed in this suit, are true, and they now here repeat the averments therein contained in answer to each of the cross-complaints above named as fully and completely as if all said averments were now again repeated.

Second. And, for further and second paragraph, said defendants say that the matters and things stated and contained in the answer of their co-defendant William B. Lent to the cross-complaint of said Crawford, heretofore filed in this suit, are true, and they now here repeat the averments therein contained in answer to said cross-complaint as fully and completely as if all said averments were now again repeated.

And now, having fully answered, they ask to be discharged with their costs.

DAVIS, *Att'y "for Def'ts."*

And the defendants Davis, Patterson, Lent, and Applegate file their joint answer to the cross-complaint of Weir, adm'r, and of Virgil D. Stockbridge. Said answer reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

Said John S. Davis, William B. Lent, Samuel H. Patterson,
424 and Charles B. Applegate, in answer to the cross-complaint of Robert M. Weir, adm'r, and Virgil D. Stockbridge, say:

That the matters and things stated in the answer of John P. Putnam

and others to the plaintiff's complaint, heretofore filed in this suit, are true, and they now here repeat the averments therein contained in answer to each of the cross-complaints above-named as fully and completely as if all said averments were now again repeated.

And now, having fully answered, they ask to be discharged with their costs, &c.

JOHN S. DAVIS,
Attorney for Def'ts.

And the defendants Simpkins Love, Caroline Love, Sarah Spurrier, George B. Spurrier, Samuel J. Kelly, and John B. Jones file their answers to all the cross-complaints; which reads in the words and figures following, to wit:

In the Floyd circuit court, Oct. term, 1864.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

Caroline Love, Simpkins Love, Samuel J. Kelly, George B. Spurrier, Sarah Spurrier, and John B. Jones, in answer to all the cross-complaints filed herein, setting up bonds and claiming judgment therein, say:

That the matters and things stated in the answer of John P. Putnam and others to the plaintiff's complaint, heretofore filed in this suit,
425 are true, and they now here repeat the averments therein contained in answer to each of the cross-complaints above-named as fully and completely as if all said averments were now again repeated.

And having now fully answered, they ask to be discharged with their costs, &c.

JOHN S. DAVIS,
Attorney for Def'ts.

And the defendant R. M. Weir, adm'r, files his answer to the cross-complaint aforesaid of John P. Putnam and others, and his answer to the cross-complaint; which read in the words and figures following, to wit:

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company et al.

Robert M. Weir, administrator of the estate of William M. Weir, deceased, answering the cross-complaint of his co-defendants John P. Putnam and others, and says that he denies each and every allegation therein contained.

HOWK AND WEIR, *Att'ys.*

And the defendant Henry Crawford files his seperate answer to the cross-complaints of D. H. Cadwalader and Mary M. Fitch, respectively; which reads in the words and figures following, to wit:

426 Floyd circuit court.

WILLIAM LINDLEY
vs.
N. A. AND S. C. J. R. R. AND OTHERS.

The defendant Henry Crawford answers the cross-complaint of David H. Cadwalader, and specifically denies each and every allegation therein contained.

R. CRAWFORD AND SON, *P. D.*

Floyd circuit court.

WILLIAM LINDLEY
vs.
N. A. AND SANDUSKY RAILROAD AND OTHERS.

The defendant Henry Crawford answers the cross-complaint of his co-defendant, Mary M. Fitch, and denies each and every allegation therein contained.

CRAWFORD AND SON, *P. D.*

And his said Crawford's reply to the answer of the defendant Lent to his said Crawford's cross-complaint; which reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE N. A. AND SANDUSKY RAILROAD CO. AND others.

The defendant Henry Crawford replies to the 2nd and 3rd paragraphs of the defendant Lent to the cross-complaint of said Crawford, and specifically denies each and every allegation therein contained.

427

And for further reply to the answer of Lent to the cross-complaint of said Crawford, said Crawford says that the judgment in the said answer of Lent mentioned was obtained by fraud and misrepresentations in this, that said Lent, said John S. Davis, and Charles B. Applegate appeared in said action, in which Victor A. Pepin was plaintiff and the New Albany and Sandusky Railroad Co. and others were defendants, and severally alleged that they were severally the holders and owners of certain mortgage bonds issued by said railroad company, and that said bonds, together with the interest warrants attached, were filed with his answer and made part thereof, when, in truth and in fact, neither said Lent, Applegate, nor Davis had ever filed said bonds in said court, nor ever produced the same as evidence, nor were they then and there the owners of said bonds, or any portion thereof, and said judgment in said Lent's answer mentioned was obtained in the manner aforesaid, and by means of the fraudulent conduct and statements of said Lent, Davis, and Applegate, and not otherwise.

Wherefore said Crawford prays judgment.

R. CRAWFORD, *P. D.*

And this cause is continued with leave to the parties hereinbefore required to answer interrogatories, and who have not yet answered the same; to answer on oath on or before the calling of this cause
428 at the next term.

And afterwards, to wit, at the April term of said Floyd circuit court, on the 4th day of May, 1865, come the parties by their attorneys, and the death of Victor A. Pepin, one of the defendants to this action, is suggested to the court; and thereupon, by consent, it ordered that this cause be continued, with leave to make the heirs of said Pepin parties defendant.

And afterwards, to wit, at the October term of said Floyd circuit court, on the 11th day of November, 1865, come the parties by their attorneys, and the defendants Putnam and others file their demurrer to the reply of Henry Crawford to their answer to his cross-complaint; which reads in the words and figures following, to wit:

WILLIAM LINDLEY
vs.
NEW ALBANY AND SANDUSKY CITY J. R. R. Co. et al.

Said John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith come and demur severally to each of the paragraphs of the reply of the said Henry Crawford to their answer filed herein, because said
429 paragraphs of said reply do not, nor do either of them, state facts sufficient to constitute a reply in law to the facts stated in said answer.

SMITH AND KERR, *P. D.*

And also their separate demurrers to the third paragraphs of plaintiff's reply to their answer to the complaint; which reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION R. R. Co. et al.

Said defendants John P. Putnam, Samuel S. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith come, and for seperate answer to the third paragraph of the plaintiff's reply to their answer to his complaint filed herein, say:

That they demur in law to the said third paragraph to the said plaintiff's reply to their said special answer filed herein, because the same does not state facts sufficient to constitute a reply to the matters stated by these defendants in their said special answer filed herein.

SMITH AND KERR,
Attorneys P. D.

Defendant Lent files his demurrer to the second paragraph of the re-

ply of Crawford to their answer to his cross-complaint; which reads in the words and figures following, to wit:

430 In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY J. R. R. Co. et al.

Said William B. Lent comes and demurs to the 2nd paragraph of the reply of said Henry Crawford to the answer of said Lent to the cross-complaint of said Crawford, because the same does not state facts sufficient to constitute a reply in law to the facts stated in said answer.

JOHN S. DAVIS,
Att'y P. D.

And the court, being satisfied in the premises, overrules the demurrers of Putnam and others and Lent, to which decision said Putnam and others and Lent, respectively, excepted at the time; and said Putnam and others file their amended answers to H. Crawford's cross-complaint, and their amended answers to the cross-complaint.

(The papers last mentioned cannot be found in the files.)

And a rule is awarded against said parties to reply to said answers.

Robert M. Weir, administrator, files his demurrer to said amended answers; which reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company, Robert M. Weir,
431 administrator, and C.

Said Robert M. Weir, administrator of the estate of William, deceased, demurs to the 2nd paragraph of the answer of John P. Putnam, Samuel J. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt-George B. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith, as amended to the cross-com, plaint of said administrator, for the following ground of objection:

That said paragraph as amended does not state facts sufficient to constitute a valid defense to said cross-complaint.

HOWK AND WEIR,
Att'ys for said Weir.

Which is taken under advisement, and by consent this action is to be continued.

And afterwards, to wit, at the April term of said Floyd circuit court, on the 17th day of May, 1866, come the parties by their attorneys, and the court, being sufficiently advised in the premises, overrules the demurrer of Weir to the amended answers to cross-complaint of Crawford and others, and also overrules the motion to make answers to cross-complaints more specific, to which rulings said Weir at the time

excepted. Defendant Crawford files demurrers to all the amended answers to his cross-complaint.

(This paper cannot be found among the files.)

432 Which demurs are overruled by the court, to which decision defendant Crawford at the time excepted.

And due proof is made to the court that legal notice had been given to the widow and heirs of Victor A. Pepin, deceased, by publication in the New Albany Weekly Ledger, for three successive weeks, before the first day of this present term of this court. The adult heirs of said Pepin, deceased, appear by H. Crawford, esqr., their attorney, and are ordered to answer. H. Crawford is appointed guardian ad litem of Ferdinand Pepin, Ella Pepin, and Pauline Pepin, and files the answers of said minors, and also the answer of Lucetta P. Pepin, adult heirs of Victor A. Pepin, dec'd; which read in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE SANDUSKY R. R. CO. ET AL.

Lucetta P. Pepin, Amelia M. Stockbridge, and Laura E. Mason answer the complaint herein, and specifically deny each and every allegation therein contained.

HENRY CRAWFORD, *P. D.*

Floyd circuit court.

WILLIAM LINDLEY
vs.
SANDUSKY R. R. CO. ET AL.

Ferdinand Pepin, Ella Pepin, and Pauline D. Pepin, by Henry Crawford, their guardian ad litem, answer the complaint, and specifically deny each and every allegation therein contained.

HENRY CRAWFORD,
Guardian ad litem.

433 And also his reply to the 2nd paragraph of Putnam's answer to his cross-complaint; which reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
SANDUSKY R. R. CO.

Henry Crawford replies to the 2nd paragraph of the answer of John P. Putnam and others to his cross-complaint, and says that he denies each and every allegation therein contained.

And for further reply to said 2nd paragraph of said answer he says that he adopts and here reiterates the matters set up in the 3rd paragraph of the plaintiff's reply to the answer of Pearson & others.

HENRY CRAWFORD, *pro se.*

Said Putnam files his demurrer to the reply (2nd paragraph) of Crawford; which reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE N. A. AND S. C. J. R. R. CO. ET AL.

Said defendants William J. Pierson, Harvey Seymour, John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George B. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith demur to the 2nd paragraph of the reply of Henry Crawford to their answer to his cross-complaint, because the same does not state facts sufficient to constitute a reply to the matters contained in their cross-complaint.

SMITH, KERR AND GHORMLEY,
For Pierson and Others, Attorneys.

434 Which is sustained by the court, and Crawford has leave to amend.

And A. E. L. Smith, Morris McDonald, John E. Noyes, John C. Culbertson, James M. Haines, receiver Ohio Insurance Company, Josiah Given, John Sloan, Madison Royer, and Bank of the State of Indiana, for Jeffersonville Branch, are called, but come not.

It is therefore ordered by the court that the complaint be taken as confessed against them.

Thereupon it is ordered that this action be continued generally.

And afterwards, to wit, at the October term of the said Floyd circuit court, on the 10th day of November, 1866, come the parties as heretofore, and said railroad company files her answer to the complaint and cross-complaints; which reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction R. R. Co. et al.

Said railroad company, for answer to the complaint of the plaintiff and the several cross-complaints of her co-defendants and to each of them, says:

That the matters and things stated in the answer of her co-defendants Pierson and Seymour, and said John P. Putnam, Samuel S. Andrews, and others, to the complaint of the plaintiff in this suit, are true,
435 and that the answers of their co-defendants John P. Putnam, Samuel S. Andrews, and others to the cross-complaints of Henry Crawford and Virgil D. Stockbridge and other cross-complaints are true; and this defendant here repeats the averments contained in said answers to the complaint of the plaintiff and to the cross-complaints of her said co-defendants, and each of them, as fully and completely as if the same were here repeated in answer to said complaint and said cross-complaint, and each of them.

And in addition to the averments therein contained this defendant says the bonds alleged by said Stockbridge to be in his possession are the same identical bonds sued on by said Pepin in said former suit; that said Pepin never after had them in his possession, but pretended to assign them said Stockbridge, who is his son-in-law, after they had been used in said former suit, as alleged in the answer of their co-defendants John P. Putnam and others to the cross-complaint of said Pepin, while they still remained in the custody of said insurance company for safe-keeping, and said Stockbridge paid no consideration whatever therefor.

And this defendant further says that the said bonds mentioned by said Henry Crawford in his cross-complaint, filed herein, are the identical used by said William B. Lent, John S. Davis, and Charles B. Applegate in said former suit, and upon which judgment was therein rendered, and said bonds were afterwards obtained by said Crawford from
436 said insurance company, as stated in the answer of her co-defendants John P. Putnam and others to the cross-complaint of said Crawford; when she prays judgment as in the aforesaid answer of Pearson, Seymour, Putnam, and others is prayed.

SMITH, KERR AND GHORMLEY,
Attorneys for said Railroad Company.

2nd. And for further and second answer herein to said complaint of the plaintiff, and each of the cross-complaints for her co-defendants filed herein, said railroad company specifically denies each and every averment therein contained.

SMITH, KERR AND GHORMLEY, *P. D.*

Thereupon Henry Crawford, esq., on behalf of the defendants he represents, files his affidavit, and moves the court thereon for an order thereon requiring the attorney of said railroad company to produce his authority for appearing in this action; therefor defendant (The Ohio Insurance Company, Henry Crawford) moves the court to take the affidavit from the files; which motion is overruled, and the attorney for said railroad company makes proof of his authority to appear to the satisfaction of the court, to which said Crawford at the time excepted.

Said railroad company withdraws her special answer, and leaves her general denial on file, and this cause is at issue.

And the judge of this court, being related to John C. Culbertson, one of the parties to this suit, he declines presiding herein, and it is
437 ordered that this cause be tried on the 19th day of February next, before Hon. Charles A. Ray, who is hereby appointed and called to try the same.

(The Hon. Charles A. Ray did not appear to try this cause on the 19th day of February, 1867.)

And afterwards, to wit, at the April term of said Floyd circuit court, on the 18th day of May, 1867, comes the plaintiff by his attorney and suggests to the court the death of D. H. Cadwalader, one of the defendants herein, and he files his supplemental complaint making George Phelps, and Martha, his wife, parties defendant, who now appear to this action by Howk and Weir, their attorneys, and on plaintiff's motion a rule is awarded against them to answer herein.

And a change of venue having heretofore been granted herein, it is now therefore ordered that this cause be tried at a special term of this court to be holden at the court-house in New Albany on the 25th of June, 1867, before some person called by the judge.

(No entry on the record as of the above date.)

And afterwards, to wit, at the October term of said Floyd circuit court, on the 6th day of November, 1867, a change of venue from the judge having been heretofore granted herein, the Hon. Patrick H. Jewett, judge of the court of common pleas, is hereby appointed to try the same in its order at the present term.

And afterwards, to wit, at the same term of said Floyd circuit court, on the 23rd day of November, 1867, comes the parties by their at-
438 torneys, and leave is granted said defendant Stockbridge to file a 2nd paragraph of his reply; which reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY }
vs. }
THE SANDUSKY CITY JUNCTION R. R. }

2nd. Virgil D. Stockbridge replies further to the 2nd paragraph of the answer of John P. Putnam and others to the complaint of this defendant, and says that the foreclosure proceeding which is set up in said 2nd paragraph was incomplete and irregular, and inoperative to pass perfect title under the judgment therein, because, in the said foreclosure action, one William Lindley, who was at the institution of said foreclosure suit the owner and holder of three of the bonds secured by the mortgage sought to be foreclosed, and being a necessary party to said proceeding, was not made a party to said action, nor were his bonds included in the said judgment of foreclosure; and further, that the said foreclosure action set up by said Putnam was irregular and inoperative, because the persons in possession of said mortgaged property were not made parties to said suit.

Wherefore this defendant says that he is not barred by said 1st judgment of foreclosure, and prays judgement.

H. CRAWFORD.

To which decision the plaintiff at the time excepted. Thereupon
439 this case is set down for trial on the 16th day of December, 1867, to which time it is ordered that this action be continued.

And afterwards, to wit, at the special term of said Floyd circuit court, on the 19th day of December, 1867, come the parties by their attorneys, and this action is submitted to the court for trial without a jury. And the trial of said action having progressed for four days, to wit, until the 19th day of December, 1867, it is thereupon ordered that the further consideration thereof be continued until the 30th day of December, 1867.

And afterwards, to wit, at the special term of said Floyd circuit court, on the 27th day of January, 1868, come the parties by their attorneys, and, after hearing the arguments of counsel, by consent it is ordered that this action be continued until February 14th, 1868.

And afterwards, to wit, at the same term of said Floyd circuit court, on the 18th day of February, 1868, come the parties by their attorneys, and come also John P. Putnam, Herman Ely, Stevenson Burke, Herman Ely, executor of the last will of C. Arthur Ely, deceased, by Stevenson Burke, their attorney, and John M. Wilson, by Butler and Gresham,

his attorneys, and, joining in the plaintiff's complaint herein, file their seperate answers herein, averring therein that they are severally the owners and holders of certain of the bonds described in the mort-
440 gage mentioned in said complaint, and severally demand judgment for the amount due on their several bonds, and the relief asked for in said complaint.

Said answers reads in the words and figures following, to wit:

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND S. C. JUNCTION R. R. Co. and others.

John P. Putnam says that he is the owner and holder of 6 of the bonds issued by said railroad company, numbered 80, 52, 78, 50, 79, 18, which are secured by mortgage in the complaint mentioned.

JOHN PHELPS PUTNAM,
By S. BURKE, *his Att'y.*

Bonds and coupons made exhibits in all respects like bonds and coupons, except as to numbers, exhibited with the complaint of Lindley,
The bonds numbers 52, 78, 50 and 79, and 18, are the same as number 80, with the exception of the number.

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

The defendant Herman Ely now comes, and, joining in the complaint, says he is the owner of twelve of the bonds issued by said company, and secured by said mortgage, numbered 37, 35, 34, 81, 84, 87,
441 85, 53, 38, 83, 33, and 36; and he prays the same relief asked by the plaintiff.

HERMAN ELY,
By S. BURKE, *his Attorney.*

(The bonds Nos. 37, 35, 34, 81, 84, 87, 85, 53, 38, 83, and 36 are the same as number 33, with the exception of No. .)

Floyd circuit court.

WILLIAM LINDLEY
vs.
N. A. AND S. C. R. R. CO. AND OTHERS.

Stevenson Burke, joining in the complaint, says that he is the owner and holder of bonds Nos. 91, 92, 93, 94, 95, 96, 97, 51, 15, 16, 17, 14, 73, 74, 75, 76, 39, 32, 31, 82, 86, issued by the said R. R. Co., and secured by the mortgage in the complaint mentioned.

Said bonds were formerly owned by Elijah De Witt, Rollin C. De Witt, Augustus H. Moss, Sarah Coit Day, Samuel J. Andrews, and Catherine D. Andrews, his wife, but said parties do not, nor does either of

them, have any interest in the subject-matter of controversy in this action. Said Burke prays the same relief asked for by the plaintiff.

STEVENSON BURKE.

Bonds and coupons made exhibits in all respects like bonds and coupons, except as to numbers, exhibited with complaint of Lindley.

442 (The bonds numbered 91, 92, 93, 94, 95, 96, 97, 51, 15, 16, 17, 73, 74, 75, 76, 39, 31, 32, 82, 86, are the same as number 14, with the exception of the number.)

Floyd circuit court.

WILLIAM LINDLEY
vs.
N. A. AND S. R. R. CO. AND OTHERS.

The said Herman Ely, as executor of C. Arthur Ely, says that the said C. Arthur Ely was, at his death, the owner and holder of bonds of the Sandusky R. R. Co., numbered 103, 105, 101, 107, 88, 104, 90, 77, 100, 102, 98, 99, 89, 106, secured by the mortgage mentioned in the complaint herein.

HERMAN ELY,
Executor of C. Arthur Ely, Deceased,
By S. BURKE, *his Attorney.*

Bonds and coupons made exhibits in all respects like the bonds and coupons, except as to numbers, exhibited with complaint of Lindley.
(The bonds numbered 103, 105, 101, 107, 88, 104, 90, 100, 102, 98, 99, 89, 106, are the same as bond No. 77, with the exception of the number.)

State of Indiana, Floyd County, in the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY, SANDUSKY CITY JUNCTION Railway Company, Thomas L. Smith, George P. Putnam, et al.

John M. Wilson, under plaintiff's complaint filed herein, says

443 he is the owner and holder of one of the one hundred and ten bonds issued by said railway company, described in plaintiff's complaint, and secured by the mortgage therein described, to wit, bond No. 49, for the sum of one thousand dollars, and the interest warrants thereto attached; which bonds and interest warrants are herewith filed, marked "A," and made part hereof, which bond and interest warrants are due and unpaid.

J. M. WILSON.

And, by consent, the trial of the issues joined in this action is now submitted to the court upon the pleadings and exhibits filed, and the proofs adduced. Upon consideration whereof, the court finds that on the 14th day of November, 1857, in this court, in an action then and there pending, wherein the said Victor A. Pepin was plaintiff, and the said railroad company and others were defendants, a judgment was rendered, and a recovery had upon the mortgage described in the plaintiff's complaint and each and all of the bonds mentioned and enumerated in

said mortgage; that under said judgment all of the premises described in said mortgage had been sold and conveyed, and such sales and conveyances approved and confirmed by this court; that by the agreement of the parties to said judgment, who were then the holders of said bonds, and the said railroad company, the said mortgaged premises were received by them in full payment, satisfaction, and extinguishment of all claims and demands on said bonds and mortgage, and of the said
444 judgment so rendered thereon, as aforesaid; that before the rendition of said judgment the bonds mentioned in said Pepin's complaint, and being the same three bonds sued on by the plaintiff in this action, were deposited by said Pepin with the plaintiff herein, to secure the payment of the debt then owing, but not then due from said Pepin, upon which said debt there is now due the plaintiff in this action, and wholly unpaid, the sum $6,911 58; that under said judgment, and the proceedings had in the pursuance thereof, there was conveyed and set off to said Pepin, in his own right, or to his assigns, of the premises described in said mortgage, the real estate in Floyd County, Indiana, described as follows, to wit: The north half of that part of the northwest quarter of section thirty-four, (34,) in township two (2) south, of range six (6) east, lying west of the Vincennes plank-road, with the exception of $1\frac{33}{100}$ acres deeded to George Lyman, containing eighty (80) acres, more or less; the undivided half of lot No. twenty-eight (28) on Upper Fourth street, in the city of New Albany; lot No. thirteen (13) on Jackson street, in Moore's plat in said city; lot No. four (4) on Scott street, in same plat; lots Nos. 23 and 24 on Poplar street, in plat No. 20 of said city; lots Nos. 33 and 35 on Elm street, in said plat No. 20; lot No. 27 on Shipping street, in said plat No. 20; and lots Nos. 2 and 3 on Beach street, in block "C" of said plat No. 20, with the appurtenances; that of real estate the undivided three-seventeenths parts thereof was
445 had and received by the said Pepin and his assigns in trust to secure the payment of said sum of money so due as aforesaid to the plaintiff in this action, and that the purchasers of said real estate now in possession thereof acquired the same with full notice of the plaintiff's equities and rights therein.

And as to each and all the other parties to this action claiming to be the owners and holders of any of the bonds described in said mortgage and seeking judgment thereon, the court further finds in favor of the defendants to their respective claims or complaints herein, and that the said claimants, and each of them, have no equities whatever in their said claims, and are not entitled to any relief in this action.

And thereupon the plaintiff, with leave of the court, amends his complaint in conformity with the finding of this court, and files his amendment accordingly, which reads in the words and figures following, to wit:

"Amendment filed on the hearing to conform to the proof: And said plaintiff charges that the said Victor A. Pepin heretofore filed his proceedings in this hon. court to compel an execution of the trust in said Pierson and Seymour, in which proceeding he said Pepin undertook, without authority from this plaintiff, or his knowledge, to represent himself as the owner of said three bonds now here sued on, and actually proceeded to final decree, and to realize the amount distributable to them of the proceeds of the sale under such foreclosure decree."

446 It is therefore considered and adjudged by the court that the said undivided three seventeenths (3-17) part of said real estate in Floyd County known and described as follows:

The north half of that part of the northwest quarter of section thirty-

four (34) in township two (2) south, of range six (6) east, lying west of the Vincennes plank-road with the exception of $1\frac{33}{100}$ acres, deed to George Lyman, containing eighty (80) acres, more or less;

The undivided half of lot No. twenty-eight (28) on Upper Fourth street in the city of New Albany;

Lot No. thirteen (13) on Jackson street, in Moore's plat in said city;

Lots Nos. 23 and 24 on Poplar street in plat No. 20 of said city;

Lots Nos. 34 and 35, on Elm street, in said plat No. 20;

Lot No. 27 on Shipping street in said plat No. 20, and lots Nos. 2 and 3 on Beach street, in Block "C" of said plat No. 20, with the appurtenances, be sold as other lands are sold on execution, without any relief whatever from valuation or appraisements laws, and that the proceeds of such sale shall be applied, first, to the payment of the costs of said action; secondly, to the payment of said William Lindley of the
447 sum of $6,911 58, with interest thereon from this date; and, thirdly, that the surplus, if any, shall be paid over to the present owners of said real estate, their heirs, or assigns.

And it is further considered and adjudged by the court that the said John P. Putnam, Herman Ely, Stevenson Burke, Herman Ely, executor of the last will of C. Arthur Ely, deceased, John M. Wilson, Henry Crawford, Virgil D. Stockbridge, and each other defendants who have filed cross-complaint herein, do take nothing by their suits herein, and as to each of their claims or complaints herein, that the defendants thereto go hence thereof without delay, &c.

STATE OF INDIANA, *Floyd County, sct:*

I, William W. Tuley, clerk of the Floyd circuit court, hereby certify that the above and foregoing is a full, true, and complete transcript of all proper entries made by the clerk, and all papers pertaining to this cause and filed herein, as the same remain of record and on file in this office.

(SEAL'S) Witness my hand and the seal of said court affixed at New
(PLACE.) Albany this 26th day of August, A. D. 1868.

W. W. TULEY,
Clerk Floyd Circuit Court.

448 Pleas before the honorable the Floyd circuit court, in the 2d judicial circuit of the State of Indiana, continued and held by adjournment at the court-house, in the city of New Albany, on the 10th day of November, 1857—Hon. George A. Bicknell, judge.

JOHN BRIGGS
v.
THE CITY OF NEW ALBANY, MICHAEL STREEPEY, The New Albany and Sandusky City Junction Railroad Company, and James Montgomery.

Be it remembered that heretofore, to wit, on the 10th day of June, 1856, the plaintiff, by Crawford, Moody, and others, filed his complaint herein in the words and figures following, to wit:

STATE OF INDIANA, *Floyd County, ss:*

In the Floyd circuit court.

John Briggs complains of the city of New Albany, Michael
449 Steepey, The New Albany and Sandusky City Junction Railroad

Company, and James Montgomery, and says that on the 18th of November, 1853, the common council of the city of New Albany passed an ordinance, which, among other things, recited that three-fourths of the legal voters of the city had petitioned the common council to subscribe for stock to an amount not exceeding $600,000 in said railroad company, and ordained that Joseph A. Moffett, mayor of the city, be authorized and directed to subscribe for the city $400,000 to the capital stock of the railroad company first aforesaid; and said Moffett, as such mayor, on the 19th of November, 1853, subscribed that amount for the city to said stock; and on the 7th of March, 1855, the common council passed a further ordinance to ratify and confirm said subscription; on the day of June, 1855, the common council ordered that a tax of forty-five cents on the $100 be levied on all the taxable property in the city on account of the city subscription to said stock. Said Streepey was the treasurer of the city, and the common council caused a tax duplicate for the year 1855 to be delivered to him with a warrant under
450 the seal of, signed by the mayor of, and attested by the clerk of, the city, directing said Streepey to collect the tax named in the duplicate, including said tax on account of railroad subscription. The plaintiff was then, and now is, a resident of said city, and owned taxable property therein, and there was assessed against him in said duplicate, on account of the city's subscription to said stock, a tax of sixty-one dollars and ninety cents; and said Streepey, on the 31st of Dec., 1855, under color of the authority of said warrant, sold at public auction, and in fee, to said Montgomery, those lands in the city which were the property of the plaintiff, and are known as the north 23 feet of lot No. 28 on State street, and lot No. 25 on Scott street, Morris plat, 16 for the sum of $62 50, to satisfy railroad tax and costs of sale.

The railroad proposed to be built by said railroad company, and for the building of which said subscription was made, extends from the city of New Albany to the line of the State of Ohio, in the direction of Sandusky, in Ohio. There was no law in force which authorized or empowered or required three-fourths or any other portion of the
451 legal voters of the city of New Albany to petition the common council to subscribe for said stock, or which gave any validity or effect to said subscription in consequence of such petition. Three-fourths of the legal voters did not so petition the common council. The ordinance of the common council to authorize the mayor to make said subscription, the subscription by the mayor, the ordinance of the common council to ratify and confirm it, the tax assessed against the plaintiff on account of it, and the sale of the plaintiff's property, under color of it, as aforesaid, are all illegal and void, and said railroad company was not rightfully organized, and was not a legal corporate body at any time before May 20th, 1856, although pretending to be such, and the plaintiff, ever since said tax was assessed, has had in said city sufficient personal property to satisfy said tax and all costs of collecting it.

Therefore the plaintiff prays that said subscription for stock, the tax so assessed against him, and the sale of his property, as aforesaid, be declared void, and that he have such other relief as shall be right.

CRAWFORD AND MOODY, &c.,
Pl'ff's Att'ys.

452 And afterwards, to wit, at the October term of said court, on the 14th day of November, 1856, among other were the following proceedings, to wit:

JOHN BRIGGS.
v.
THE CITY OF NEW ALBANY, &C.

Come the parties, and The City of New Albany files her demurrer to so much of the complaint herein as avers that the said plaintiff, at and after the time of the assessment of the tax in said complaint mentioned, was the owner of personal property in said city, subject to taxation.

Said demurrer was as follows, to wit:

JOHN BRIGGS
v.
THE CITY OF NEW ALBANY, MICHAEL STREEPEY, The New Albany and Sandusky City Junction Railroad Company, and James Montgomery.

The City of New Albany, by her attorney, demurs to the allegations of the complaint herein, which reads as follows, to wit: "And the plaintiff, ever since said tax was assessed, has had in said city sufficient personal property to satisfy said tax, and all costs of collecting it,"
453 for the following ground of objection:

1st. That said allegation does not state facts sufficient to constitute a cause of action.

JOHN H. STOTSENBURY, *Att'y.*

And the said Montgomery files a like demurrer, and, after argument, said demurrers are sustained by the court, and said defendants are ordered to answer the residue of said complaint, and the said railroad company, Montgomery, and The City of New Albany, file seperate answers accordingly.

The answer of the said railroad company reads as follows, to wit:

JOHN BRIGGS
v.
CITY OF NEW ALBANY ET AL.

Said railroad company, a defendant, answering in her defense, says, for answer to plaintiff's complaint, that she admits that said common council passed an ordinance on the 18th November, 1853, reciting and authorizing as stated in plaintiff's complaint; that on 19th November, said sum was subscribed; that on the 7th of March, 1855, an ordinance ratifying and confirming said subscription, as plaintiff has alleged; but she denies each and every allegation in said complaint, except as
454 herein above admitted, except that proposed railroad extended from a point in the city of New Albany to the line of the State of Ohio, in the direction of Sandusky, in Ohio.

SMITH AND DAVIS, *P. D.*

The answer of defendant Montgomery reads as follows:

JOHN BRIGGS
v.
THE CITY OF NEW ALBANY ET AL.

James Montgomery, a defendant, seperately answering, says:

1. That he has never perfected any title to the property alleged to have been purchased by him, and prays to be hence dismissed.

2. He admits the facts stated in the petition, except so much thereof as denies the lawful existence of said company, and that ⅔ of the citizens did not subscribe and petition for the subscription by the city council, and the asserted illegality and nullity of the laws and ordinances in said complaint alleged. He denies that he is a rightful party to this suit, and prays to be dismissed with costs and general relief.

S. AND DAVIS.

455 The seperate answer of the defendant The City of New Albany reads in the words and figures following, to wit:

Floyd circuit court, Oct. T., 1856.

JOHN BRIGGS
v.
THE CITY OF NEW ALBANY ET AL.

The City of New Albany, answering, says that she admits that said common council passed an ordinance on the 18th November, 1853; that said subscription was made on the 19th November, 1853; that an ordinance was passed on the 7th of March, 1855; that a tax was levied; and she denies the other matters alleged in the complaint, and requires strict proof thereof.

2d. And for 2d defence, said city alleges, admitting the passage of the ordinances stated and the subscription of the stock, the levy of the tax, and that the plaintiff is a resident owner of taxable property in said city, and denying the other allegations in said complaint, except so much as alleges that ⅔th did not subscribe; as to that defefendant says that said ordinance was passed reciting that ⅔ths of the legal voters of New Albany petitioned said common council to subscribe for said stock, not exceeding $600,000, and, relying upon said company, permitted said
456 city to subscribe for shares of the corporate capital stock of said company, and took the bonds of said city in payment thereof, and issued to said city the requisite certificates for said capital stock so subscribed; and said defendant pleads and submits to the court that said acts and doings were in good faith, and that said city and each taxpayer thereof is estopped from setting up that ⅔ths of the legal voters did not sign petitions to said council, praying for said subscription.

JNO. H. STOTSENBURY, *Att'y.*

The plaintiff thereupon files her demurrer to the second defence of The City of New Albany as follows, to wit:

JOHN BRIGGS
v.
CITY OF NEW ALBANY, &C.

And said plaintiff demurs to the second answer of said city, and for cause sets down—

1. That the matters therein contained are no estoppel to said plaintiff.

2. And that said defendant cannot set up its own act as an estoppel against this plaintiff.

3. And for that said answer contains no sufficient defence against the action herein.

457 CRAWFORD, &c., *f'r Pl'ff.*

Which demurrer, after argument, is sustained by the court, and the city files an amended 2d defence, (which amendment is by interlineation, and is set out in full above,) and the plaintiff answers thereto as follows, to wit:

And the said plaintiff demurs to the amended second defense of the said City of New Albany, and for cause sets down:

1. The matters of estoppel therein pleaded are no bar to the plaintiff's action.

2. That said city cannot set up its own act as an estopple against this plaintiff.

CRAWFORD, &c., *P'y.*

And the demurrer is sustained, and the city again amends her 2d defence, (said amendment is not found in the files,) and the plaintiff files his reply thereto, (said reply is not found in the files of the case in the clerk's office,) and also his seperate replys to the answers of the said Montgomery and the said railroad company.

And afterwards, to wit, at the same term of said court, in the 15th day of November, 1856, come the parties by their counsel, and, by consent, it is ordered that the testimony be taken by D. C. Anthony
458 and George V. Howk, as commissioners in the case of Peter Tellon v. The City of New Albany, &c., and the report of said commissioners shall be regarded as testimony taken in this case, and this cause is continued until next term.

And afterwards, to wit, at the April term of said court, on the 18th day of May, 1867, come the parties by their attorneys, and it is ordered by the court that the commissioners heretofore appointed to take proof in this action have further time to make report herein, the taking of the evidence to be closed within twenty days before the next term of this court, at which time the commissioners are ordered to make report of the evidence then taken, and this action is ordered to be continued.

And afterwards, to wit, at the October term of said court, on the 10th day of November, 1857, among other were the following proceedings, to wit:

JOHN BRIGGS
v.
THE CITY OF NEW ALBANY, THE NEW ALBANY and Sandusky City Junction Railroad Company, James Montgomery, and Michael Streepey.

459 Come now George V. Howk and D. C. Anthony, esq'rs, commissioners heretofore appointed to take the proofs upon an issue herein joined, as to whether three-fourths of the loyal voters of said city in 1853 had petitioned the common council thereof to subscribe for said stock, and to make report therein, and make report they have since the October term, 1856, of this court, proceeded to take the proof which is now here submitted, and that they find that three-fourths of the legal voters of said city did not petition for the subscription of four hundred thousand dollars of the stock of said railroad company; which report is now here by the court approved, and ordered to be filed amongst the papers of this cause.

And thereupon come the said parties by their attorneys, and agree the

court now here shall order and decree that said city and its offices and the said railroad company shall be perpetually restrained and enjoined from taking any steps to enforce or collect any tax or taxes assessed against said Briggs for said railroad purposes, and vacating and annulling all sales of his property heretofore made therefore.

Whereupon, on motion of said Briggs, and pursuant to said
460 finding and arguments, it is ordered that the said City of New Albany and its officers and said railroad company be, and they are hereby, restrained and perpetually enjoined from taking any further steps to enforce or collect any tax or taxes assessed against said Briggs for said railroad purposes.

It is also ordered and decreed, in pursuance to said finding and agreement, that all sales heretofore made by order of said city, or under or by any of its officers, of any of the property of said Briggs on account of taxes assessed for said railroad purposes to any of said defendants, be, and the same are hereby, set aside and held for naught as if they had never been made.

It is also ordered that said Howk and Anthony be allowed the sum of five hundred dollars each, to be taxed as part of the costs herein.

And it is also ordered, by the agreement of the parties as aforesaid, that said City of New Albany pay the costs of this suit, and that said plaintiff have execution therefor; all of which is finally ordered, adjudged, and decreed.

STATE OF INDIANA,
Floyd County, sct:

461 I, William W. Tuly, clerk of the Floyd circuit court, hereby certify the foregoing to be a full, true, and complete transcript of all proper entries made by the clerk, and all papers pertaining to this cause on file therein, as the same appear of record and on file in our office.

Witness my hand and the seal of said court this 30th day of April, 1869.

[SEAL.] W. W. TULEY, *Clerk.*

462 Pleas before the honorable the Floyd circuit court in the 2 judicial circuit of the State of Indiana, continued and held by adjournment at the court-house in New Albany on the 10th day of November, 1857—Honorable George A. Bicknell, judge.

PETER TELLON
v.
THE CITY OF NEW ALBANY, MICHAEL STREEPEY, The New Albany and Sandusky City Junction Railroad Company, and James Montgomery.

Be it remembered that heretofore, to wit, on the 10th day of June, 1856, the plaintiff, by Crawford, Moody, &c., his attorneys, filed his complaint herein as follows, to wit:

STATE OF INDIANA, *Floyd County, ss:*

In the Floyd circuit court.

463 Peter Tellon complains of The City of New Albany, Michael Steepey, The New Albany and Sandusky City Junction Railroad

Company, and James Montgomery, and says that on the 18th of November, 1853, the common council of the city of New Albany passed an ordinance, which (among other things) recited that three-fourths of the legal voters of the city had petitioned the common council to subscribe for stock to an amount not exceeding $600,000 in said railroad company or in the Fort Wayne and Southern Railroad Company, and ordained that Joseph A. Moffit, mayor of said city, be authorized and directed to subscribe for the city $400,000 to the capital stock of the railroad company first aforesaid; and said Moffett, as such mayor, on the 19th day of November, 1853, subscribed that amount for the city to said stock; and on the 7th of March, 1855, the common council passed a further ordinance to satisfy and confirm said subscription; on the day of June, 1855, the common council ordered that a tax of forty-five cents on the $100 be levied on all the taxable property of the city, on account of the city subscription to said stock. Said Steepey was the treasurer of the city, and the common council caused a tax dupli-
464 cate for the year 1855 to be delivered to him, with a warrant under his seal, signed by the mayor and attested by the clerk of the city, directing said Streepey to collect the taxes named in the duplicate, including said tax on account of said railroad subscription. The plaintiff was then, and now is, a resident of said city, and owned taxable property therein, and there was assessed against him in said duplicate, on account of the city's subscription to said stock, or tax of forty dollars and seventy-three cents; and said Streepey, on the 31st of December, 1855, under color of authority of said warrant, sold at public auction in fee to said Montgomery those lands in the city which were the property of the plaintiff, and are known as the east forty-seven feet of lot No. 37, on Lower High street; lot No. 3 and the undivided half of lot No. 2, on Lower Market street, Gore; lots Nos. 19 & 20, on Lower Water street; lot No. 10, on Lower 4th street; and north half of lot No. 6, on Lower Fifth street; letter "A" and south half of lot 36, plat 19, for the sum of $41 43, to satisfy said railroad tax and the costs of sale.

The railroad proposed to be built by said railroad company, and for building which said subscription was made, extends from the city
465 of New Albany to the line of the State of Ohio, in the direction of Sandusky, in Ohio. There was no law in force which authorized or required three-fourths or any other proportion of the legal voters of the city of New Albany to petition the common council to subscribe for said stock, or which gave any validity or effect to said subscription in consequence of said petition. Three-fourths of the legal voters of the city did not so petition the common council; the ordinance of the common council to authorize the mayor to make said subscription, the subscription by the mayor, the ordinance of the common council to ratify and confirm it, the tax assessed against the plaintiff on account of it, and the sale of the plaintiff's property under color of it as aforesaid, are all illegal and void; and said railroad company was not rightfully organized, and was not a legal corporation at any time before May 20th, 1856, although pretending to be such; and the plaintiff, ever since said tax was assessed, has had in said city sufficient personal property to satisfy said tax and all costs of collecting it.

Therefore the plaintiff prays that said subscription for stock,
466 the tax so assessed against him, the sale of his property as aforesaid, be declared void, and that he have such other relief as shall be right.

CRAWFORD, MOODY, &c.,
Pl'ff Att'ys.

And afterwards, to wit, at the October term of said court, on the 14th day of November, 1856, among other were the following proceedings, to wit:

PETER TELLON
v.
THE CITY OF NEW ALBANY ET AL.

Come the parties, and The City of New Albany files her demurrer to so much of the complaint herein as avers that the said plaintiff, at and after the time of the assessment of the tax in said complaint mentioned, was the owner of personal property in said city subject to taxation; and the said Montgomery files a like demurrer; and, after argument, said demurrers are sustained by the court, and said defendants are ordered to answer the residue of said complaint; and said railroad company, City of New Albany, and Montgomery files seperate answers accordingly.

(Said answers are not now on the files.)

The plaintiff thereupon files his demurrer to the 2d defence of
467 The City of New Albany as follows, to wit:

PETER TELLON
vs.
THE CITY OF NEW ALBANY, &C.

And said plaintiff demurs to the second answer of said city, and for cause sets down:

1. That the matters therein contained are no estopple to said plaintiff.
2. And that said defendant cannot set up its own act as an estopple against this plaintiff.
3. And for that said answer contains no sufficient defense against the action herein.

COLLINS, &C., *for Pl'ff.*

Which demurrer, after argument, is sustained by the court, and the city files an amended second defense, (not on file,) and the plaintiff demurs thereto as follows:

PETER TELLON
v.
CITY OF NEW ALBANY, &C.

And said plaintiff demurs to the amended second defense of the said City of New Albany, and for cause sets down:

468 1. The matters of estopple therein pleaded, and no bar to the plaintiff's action.

2. That said city cannot set up its own act as an estopple against this plaintiff.

COLLINS AND LAFALLETTE,
for Pl'ff.

And the city amends the second defense, (not on file at this time,) and the plaintiff files his reply thereto, (not on file at this time,) and also his seperate replies to the answer of the said Montgomery and the said railroad company, (not on file at this time;) and, by consent of parties,

the issues herein are submitted to the court for trial without a jury, and the consideration thereof is deferred until to-morrow morning.

And afterwards, to wit, at the same term of said court, on the 15th day of November, 1856, among other were the following proceedings, to wit:

PETER TELLON
v.
THE CITY OF NEW ALBANY ET AL.

Come now the parties by their counsel, and, by consent, it is ordered by the court that D. C. Anthony and George V. Howk be, and they are hereby, appointed commissioners in this cause, to take and re-
469 port to the court, at the next term, testimony upon the issue joined herein, whether or not three-fourths of the legal voters of New Albany, in the year 1853, signed that petition to the common council, praying for a subscription to railroad stock, as in the pleadings is alleged; and that said commissioners report to the court, not only the testimony by them taken by virtue hereof, but also the fact as found by them upon the testimony; and this cause is continued until next term.

And afterwards, to wit, at the April term of said court, on the 18th day of May, 1857, among other were the following proceedings, to wit:

PETER TELLON
v.
THE CITY OF NEW ALBANY ET AL.

Come the parties by their attorneys, and it is ordered by the court that the commissioners heretofore appointed to take proof in this action have further time to make report herein, the taking of the evidence to be closed within twenty days before the next term of this court, at which time the commissioners are ordered to make report of the evidence then taken; and this action is ordered to be continued.

470 And afterwards, to wit, at the October term of said court, on the 10th day of November, 1857, among other were the following proceedings, to wit:

PETER TELLON
v.
THE CITY OF NEW ALBANY, THE NEW ALbany and Sandusky City Junction Railroad Co., James Montgomery, and Michael Streepey.

Come now George V. Howk and D. C. Anthony, esq'r's, commissioners heretofore appointed to take the proofs upon an issue herein joined, as to whether three-fourths of the legal voters of said city in 1853 had petitioned the common council thereof to subscribe for said stock, and to report thereon, and make a report. They have since the October term, 1856, of this court, proceeded to take the proof, which is now here submitted; and that they find that three-fourths of the legal voters of said city did not petition for the subscription of four hundred thousand dollars of the stock of said railroad company; which report is here now

by the court approved, and ordered to be filed amongst the
471 papers of this cause; and thereupon come the said parties by their respective attorneys, and agree that the court now here shall order and decree that said city and its officers, and the said railroad company, shall be perpetually restrained and enjoined from taking any further steps to enforce or collect any tax or taxes assessed against said Tellon for said railroad purposes, and vacating and annulling all sales of his property heretofore made therefore.

Whereupon, on motion of said Tellon, and pursuant to said finding and agreement, it is ordered and decreed that said City of New Albany, and its officers, and said railroad company, be, and they are hereby, perpetually restrained and enjoined from taking any further stepts to enforce or collect any tax or taxes assessed against said Tellon for said railroad purposes.

It is ordered and decreed, in pursuance of said finding and agreement, that all sales heretofore made by order of said city, or under or by any of its officers, of any of the property of said Tellon, on account
472 of taxes assessed for said railroad purposes to any of said defendants, be, and the same are hereby, set aside and held for nought, as if they had never been made.

It is ordered that said Howk and Anthony be allowed the sum of five hundred dollars each, to be taxed as a part of the costs herein.

And it is also ordered, by the agreement of parties as aforesaid, that said City of New Albany pay the costs of this suit, and that said plaintiff have his execution therefore; all of which is finally ordered, adjudged, and decreed.

STATE OF INDIANA, *Floyd County, set:*

I, William Tuley, clerk of the Floyd circuit court, hereby certify the foregoing to be a full, true, and complete transcript of all proper entries made by the clerk, and all papers pertaining to this cause on file therein, as the same appear of record and on file in our office.

473 Witness my hand and the seal of said court affixed at New Albany this 1st day of May, A. D. 1869.

[SEAL.] W. W. TULEY, *Clerk.*

474 Please before the honorable the judge of the Floyd circuit court, within the second judicial circuit of the State of Indiana, continued and held by adjournment at the court-house, in the city of New Albany, on the thirteenth day of May, A. D. 1858.

Present, the Honorable James Callins, sole judge pro tem.

VICTOR A. PEPIN
v.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, Thomas L. Smith, John S. Davis, James Montgomery, William M. Weir, William B. Lent, Charles B. Applegate, and John S. McDonnald.

Be it remembered that heretofore, to wit, on the 21st day of
475 January, 1858, the plaintiff, by his attorneys, filed in the office of the clerk of the Floyd circuit court his complaint herein; which reads in the words and figures following, to wit:

THE STATE OF INDIANA, *Floyd County, ss:*

In the Floyd circuit court, April term, 1858, Victor A. Pepin, plaintiff, complains of the New Albany and Sandusky City Junction Railroad Company, John S. Davis, Charles B. Applegate, James Montgomery, John S. McDonald, William B. Lent, Thomas L. Smith, and William M. Weir, defendants, and says that the said New Albany and Sandusky City Junction Railroad Company executed a mortgage, conveying to said plaintiff and the said defendants Davis, Applegate, Montgomery, McDonald, Lent, Smith, and Weir the lands and lots in said mortgage described, as security to each of them and said plaintiff, in the sum of two thousand two hundred and sixty dollars, which said parties and said plaintiff had become respectively liable for, for said railroad company, making, in all, the sum of eighteen thousand one hundred and eight dollars, which mortgage is herewith filed and made part of this complaint.

476 And the plaintiff would further show that he has been compelled to pay said sum of two thousand two hundred and sixty dollars that he was liable for as aforesaid for said railroad company, which sum was to be paid without any benefit from valuation or appraisement laws of the State of Indiana. And said plaintiff would further show that all of said other parties have paid their several amounts secured to them by said mortgage, and that said several sums were to be paid to them respectively, without benefit from the valuation or appraisement laws of the State of Indiana.

Wherefore, in view of the premises, said plaintiff sues and demands judgment against said railroad company for twenty-five hundred dollars, the foreclosure of said mortgage, the sale of said mortgaged property, or so much thereof as may be necessary to pay said debt, and for all other proper relief.

VICTOR A. PEPIN,
By OTTO AND DAVIS,
His Attorneys.

Said mortgage filed with and referred to in the foregoing complaint reads as follows:

477 This indenture made the 20th day of October, in the year 1857, between The New Albany and Sandusky City Junction Railroad Company, of the one part, and Victor A. Pepin, John S. Davis, Charles B. Applegate, James Montgomery, John S. McDonald, William B. Lent, Thomas L. Smith, and William M. Weir, of Floyd County, Indiana, of the other part, witnesseth that, for and in consideration of eighteen thousand dollars in hand paid, said railroad company hereby conveys and warrants to the said Pepin, Davis, Applegate, Montgomery, McDonald, Lent, Smith, and Weir, forever, the north one hundred and fifty-eight feet, more or less, commencing two hundred feet from the front corner of Benjamin Conner's house, in out-lot letter "C," fronting on Upper Sixth street, and running back one hundred and thirty feet the same width, and adjoining the lot purchased by said company of John Farnell, said lot being known as a part of the Ferry lot, and being the same property purchased by said company of Thomas Connor and wife, by deed bearing date June the 5th, 1856, with the appurtenances, and all that part of out-lot No. fifty, in the town of Clarksville, Clark

478 County, Indiana, which lies south of the center of the Clark County Central plank-road, and west of a line drawn and produced from the east side of lot number sixty-six, in said town, to the center of said plank-road, containing ten acres more or less; also out-

No. two, in the first range of out-lots, in the city of New Albany aforesaid; and lot Number fourteen, in Winstandly and Newkirk's addition to said city of New Albany; and also lots numbers twelve, fourteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, and twenty-six, on Lower Seventh street, of John Evans' plat of lots letters "D," "E," and "F," on Lower Water street, in said city of New Albany; also lots numbers fifteen, seventeen, twenty-three, twenty-five, twenty-seven, twenty-nine, on Evans' street plat, and the southern ten feet in front and rear by one hundred and twenty feet deep of lot number nineteen, in said Evans' plat, and lot number forty-nine on Upper Vincennes street, in said city, with the appurtenances.

The foregoing conveyance is made for the purposes following, to wit:

479 Whereas said Pepin, Davis, Applegate, Montgomery, McDonald, Lent, Smith, and Weir have each became liable for the sum of two thousand two hundred and sixty-six dollars for said railroad company, making in all the sum of eighteen thousand one hundred and eight dollars:

Now, therefore, if said company shall an will save each of said parties harmless, and from the payment of anything on account of said liabilities, then the foregoing mortgage to be void, otherwise to be and remain in full force and virtue in law; and the same shall be collectable without any benefit from the valuation or appraisement laws of the State of Indiana.

In witness whereof I, James Montgomery, the president of said New Albany and Sandusky City Junction Railroad Company, by the authority and direction of said company, have hereto subscribed my name as such, and affixed the seal of said railroad company, this 20th day of October, 1857.

[L. S.] JAMES MONTGOMERY,
President of the New Albany and Sandusky City Junction R. R. Co.

Attest: JOHN W. CHILDS, *Sec't'y of said Co.*

STATE OF INDIANA, *Floyd County, ss:*

480 Personally appeared before me, William A. Scribner, a notary public within and for the county aforesaid, the above-named James Montgomery, and acknowledged the foregoing written instrument to be the act and deed of The New Albany and Sandusky City Junction Railroad Company, for the uses and purposes therein expressed, and that he, as president of said company, in his official capacity, has executed the foregoing indenture by the order and direction of said company.

In witness whereof I hereto set my name and impressed my [L. S.] notarial seal at the city of New Albany this 27th day of October, A. D., 1857.

Upon the filing of which complaint and exhibit the following writ issued:

The State of Indiana to the sheriff of Floyd County, greeting:

We command you to summon The New Albany and Sandusky City Junction Railroad Company, John S. Davis, Charles B. Applegate, James Montgomery, John S. McDonald, William B. Lent, Thomas L. Smith, and William M. Weir, if they be found in your bailiwick, per-

sonally to appear before the honorable Floyd circuit court, on the second day of the next term thereof, to be holden at the court-
481 house in the city of New Albany, on the fourth Monday of April, 1858, then and there to answer to the complaint of Victor A. Pepin; and of this writ make due service and return.

Witness Salem P. Town, clerk of said court, and the seal thereof hereto affixed, at the court-house in New Albany, this 21st day of January, 1858.

[L. S.] SALEM P. TOWN, *Clerk.*

Upon which the sheriff made the following return:

I have served this writ upon all of the within-named defendants by reading the same in their presence and hearing, and also on James Montgomery, president of the within-named railroad company, by reading the same to him in his presence and hearing.

Feb. 11, 1858.

CHARLES FREDRICKS, *S. F. C.*

And afterwards, to wit, at the April term of said court, continued and held as aforesaid, and on the 30th day of April, 1858, come the parties, by their attorneys, and on motion of the plaintiff, a rule is awarded against the defendant to answer herein on to-morrow morning.

And afterwards, to wit, on the 13th day of May, 1858, and at the same time of said court, comes the plaintiff, by his attorneys, and the defendants also come by their attorneys, and the said railroad company, for
482 seperate answer herein, says and admits that all the matters and things stated in said plaintiff's complaint are true; that the amount due to said plaintiff, and to each of said other defendants, is eighteen hundred dollars, which is payable without any relief from valuation and appraisement laws. And the said other defendants Thomas L. Smith, John S. Davis, James Montgomery, William M. Weir, William B. Lent, Charles B. Applegate, and John S. McDonald, each for his seperate answer, herein says that he admits the execution of said mortgage for the purpose of securing the payments of the several amounts therein set forth, and avers that he has been compelled to pay, and has paid, the whole amount mentioned and secured to him in said mortgage, being the sum of twenty-two hundred and sixty-six dollars, of which sum there yet remains due to him and unpaid the sum of eighteen hundred dollars, which is payable without any relief from the valuation and appraisement laws. And this matter being submitted to the court for final trial upon the plaintiff's complaint, and said several answers and proofs to be adduced, and the court, being fully advised in the premises, finds that there is due from said New Albany and Sandusky City Junction Railroad Company, to each of said other defendants, and to said plaint-
483 iff, by reason of the matters in said plaintiff's complaint contained, the said sum of eighteen hundred dollars, to be executed as aforesaid, and that said mortgage ought to be foreclosed.

It is now, therefore, considered and decreed by the court that the said Victor A. Pepin, Thomas L. Smith, John S. Davis, Cha's B. Applegate, James Montgomery, William B. Lent, William M. Weir, and John L. McDonald, do each, in severalty and in his own separate right, recover of said railroad company the said sum of eighteen hundred dollars, together with all costs by him herein expended, to be executed as aforesaid; and that said mortgage be foreclosed, and said mortgaged premises, or so much thereof as may be necessary to pay said several sums

and all costs herein, be sold as other lands are sold on execution, and that said mortgaged premises are correctly described as follows, to wit: The north one hundred and fifty-eight feet, more or less, commencing two hundred feet from the front corner of Benjamin Conner's house, in out-lot "C," fronting on Upper Sixth street, and running back one hundred and thirty feet the same width, and adjoining the lot pur-
484 chased by said company of John Farrell, said lot being known as a part of the Ferry lot, and being the same property purchased by said company of Thomas Conner and wife, by deed bearing date of June 5th, 1856, with all the appurtenances; and all that part of out-lot No. fifty, in the town of Clarksville, Clark County, Indiana, which lies south of the center of the Clark County Central plank-road, and west of a line drawn and produced from the east side of lot No. sixty-six, in said town, to the center of said plank-road, containing ten acres, more or less; also out-lot number two, in the first range of out-lots in the city of New Albany aforesaid, and lot number fourteen, in Winstandly and Newkirk's addition to said city of New Albany; and also lots number twelve, fourteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, and twenty-six, on Lower South street, of John Evans' plat of lots letters "D, E, F," on Lower Water street, in said city of New Albany; also lots numbers fifteen, seventeen, twenty-three, twenty-five, twenty-seven, twenty-nine, in Evans' street plat; and the southern ten feet in front and rear by one hundred and twenty feet deep of lot number nineteen in said Evans' plat; and number forty-nine on Upper Vincennes street in said city, with
485 all the appurtenances; and that, upon the sale of said real estate, or of any part or parts thereof, as aforesaid, the equity of redemption of said railroad company in and to the parts so sold shall be forever barred and foreclosed; and if the proceeds of the sale of said real estate should be insufficient to pay said several sums and costs, then the said several persons shall have execution further against any other property of said railroad company subject to execution.

STATE OF INDIANA, *Floyd County, sct:*

I, William Tuley, clerk of the Floyd circuit court, hereby certify the forgoing to be a full, true, and complete transcript of all proper entries made by the clerk, and of all papers pertaining to the action and filed therein, as the same appears of record on the final record book in our office.

Witness my hand and the seal of said court, affixed at New Albany, June 2, 1869.

[SEAL.] W. W. TULEY, *Clerk.*

486 Here follows the evidence offered in rebutting by the complainants:

1st. Resolution of The New Albany and Sandusky City Junction Railroad Company, adopted by its board of directors on the 5th day of May, 1854, as extracted from page 29 of the minutes of said board.

"Also that the president be authorized to negotiate a loan for the use of this company, by making and executing in its name and behalf any notes or bonds for the repayment of such loan at such times and places and at such a rate of interest as may be agreed upon, and to hypothecate the bonds of the city of New Albany belonging to the company, or any portion of them, as security for the repayment of such loan; and, in case of such hypothecation, to agree, if he shall deem it expedient, that

the holder shall have the privalige, within any named period; to purchase said bonds at a price agreed upon."

487 Depositions of Thomas L. Smith, John S. McDonald, and John S. Davis, witnesses produced and sworn before me, Henry M. Rowley, a notary public of Floyd County, at New Albany in said county, State of Indiana, on the 28th day of March, 1868, pursuant to the enclosed notice.

These depositions were taken on the part of the complainants in a certain action now pending in the circuit court of the United States for the district of Indiana, wherein Heman Ely et al. are complainants, and The New Albany and Sandusky City R'road Co. et al. are defendants.

The said Thomas L. Smith, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the said cause, deposes as follows:

Ques. 1. State your name, age, occupation, and residence.

488 Before answering any questions, I state that I appear at the request of the counsel of the complainant, for the purpose of the taking of this deposition as a witness only, and do not waive any objections as counsel for the City of New Albany, or any other party, to the time, place, or manner of taking, or any other objection to this or any other deposition that may be now taken.

Answer to the question 1st. My name is Thomas L. Smith; age, about 63; occupation, attorney at law and solicitor in chancery; residence, city of New Albany, Indiana.

2d. Question by the same. State whether you were a practicing attorney at New Albany in 1857 and 1858, and what knowledge you have, if any, of a suit about that time determined in the circuit court of Floyd County, Indiana, wherein Victor A. Pepin was pl'ff, The New Albany and Sandusky City Junction Railroad Company, William S. Pearson, jr., Harvey Seymour, and others were defendants.

Answer. I was a practicing attorney at New Albany in 1857 and 1858. I knew there was such a suit instituted at the October term of the Floyd circuit court, wherein Pepin was plaintiff, and said railroad company, Pierson, Seymour, and others were defendants.

489 3d. State whether you was an attorney in that case; and, if so, what parties or who you represented therein.

Answer. I did appear as an attorney in that case, and with my law partner at that time, M. C. Kerr, represented said Pearson and Seymour, who were the trustees named in a mortgage or deed of trust sought to be foreclosed in that suit. We may also have appeared for the railroad company; I cannot now recollect whether we did or not.

Question. What official position did you hold about that time in the New Albany and Sandusky City Junction Railroad Company?

Answer. I was one of thirteen directors of said company. I held no other official position. I had been secretary until October, 1856, when J. P. Allen was appointed secretary.

Question. State whether you was attorney for Heman Ely and others, in the partition suit of bonds bid off by Pepin and Kerr for the bondholders in the suit of Pepin against the R. R. Co. above-named.

Answer. I think I did, with Mr. Kerr, by the name of Smith and Kerr, represent Heman Ely and others in that suit.

Question by same. State whether you were a party in both of
490 the above-named suits.

Answer. I was a party in both those suits.

Question. State what authority, if any, you had to compromise or

accept the lands described in the mortgage made by the said railroad company to Pierson and Seymour, as trustees, in satisfaction of the bond or claims represented by the trustees in the foreclosure suit.

Answer. I had no such authority, and did not make any such compromise.

Question. State what you know, if anything, in regard to Pierson and Seymour accepting said lands in satisfaction of said bonds, or of any compromise being made in respect thereto between said Pierson and Seymour, or the bondholders represented by them on one side and the railroad company on the other.

Answer. I have no knowledge on the subject of this question.

Question. State what you know of any satisfaction or extinguishment of the judgment rendered against said R. R. Co. in favor of said trustees.

Answer. I do not know of any satisfaction of the judgment, except so far as the lands received by the parties operated as such satisfaction or extinguishment.

491 Question. State whether you know of any compromise or settlement being made between the real estate bondholders upon one side and the railroad company upon the other at any time; and especially whether you know of any such compromise being made by said Pierson and Seymour or the bondholders represented by them.

Answer. I do not. I have always been under the impression that the bonds held by myself were fully satisfied by the share of the railroad lands received by me, but I have no recollection of any specific agreement made with the railroad company or others to that effect.

Question. Have you any of the books or records of said railroad company in your possession; if so, what?

Answer. There is a book containing the proceedings of the board of directors of said railroad company now accidentally in my office. I cannot say it is properly in my custody. I procured it a few days ago from the office of G. V. Howke, esq., for the purpose of examining it.

Question. State whether you know of any record therein of a compromise between said real estate bondholders and said railroad company.

492 Answer. I do not.

THOMAS L. SMITH.

The said John S. McDonald, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the said cause, deposes as follows:

Question 1. State you age, occupation, and place of residence.

Answer. I am about sixty years of age; banker; residence, New Albany.

Question. State whether you were a director in the New Albany and Sandusky City Junction Railroad Company; if so, how long, and when; and whether you were a party to the foreclosure suit of the real estate bonds of said company prosecuted by Victor A. Pepin in 1857.

Yes; I was a director of said railroad co. from its organization up to the it ceased to exist. I was a party to the foreclosure suit bro't by Pepin and others.

Question. State whether you know of any agreement between Pierson and Seymour, or the real estate bondholders represented by them, on one side, and the railroad company on the other, by which the indebtedness of said company upon said bonds represented by Pierson and Seymour was satisfied or discharged.

493 Answer. I do not.

J. S. McDONALD.

The said John S. Davis, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the said cause, deposes as follows:

Question 1. State your age, and occupation, and place of residence; whether you were an attorney in the foreclosure suit of Pepin v. The New Albany and Sandusky City Junction Railroad Company and others in 1857.

Answer. I am 53 years old; am attorney at law; reside in New Albany. I was attorney for Pepin and others in said foreclosure suit.

Question by same. Were you a director in said railroad company at any time; if so, when? And were you ever attorney for said company; if so, when?

Answer. I was a director during the entire time of its existence. I was attorney for the company during the latter half of its existance except in said foreclosure suit.

494 Question. State what you know, if anything, of any compromise or settlement between Pierson and Seymour, or the bondholders represented by them in said suit and said railroad company by which the amount owing by said company to said bondholders upon their real estate bonds was satisfied, discharged, or extinguished.

Answer. I know nothing of any such compromise.

Question. State if you know of said bondholders taking the real estate described in said mortgage, or any other real estate of said company, upon any compromise or settlement, or in any other way than by legal proceedings in court.

Answer. I do not know of their receiving anything except what they received by virtue of legal proceedings in court.

JOHN S. DAVIS.

495 STATE OF INDIANA, *Floyd County:*

I, Henry M. Rowley, a notary public within and for said county, hereby certify that the above Thomas L. Smith, John S. McDonald, and John S. Davis wer by me first duly sworn according to law to testify the truth, the whole truth, and nothing but the truth relating to said cause; that their depositions were reduced to writing by said witnesses in my presence, and under my direction, and said depositions were taken at the office of Butler, Gresham and Butler, in the city of New Albany, county of Floyd, and State of Indiana, on the 28th day of March, 1868, between the hours of 9 a. m. and 4 p. m. of said day.

In testimony whereof I hereunto set my hand and official seal this 30th day of March, 1868.

[SEAL.] HENRY M. ROWLEY,
Notary Public.

496 UNITED STATES OF AMERICA,
District of Indiana:

I, John D. Howland, clerk of the circuit court of the United States in and for the seventh judicial circuit and district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy and transcript of the record and proceedings in the cause above entitled as fully as the same remain in said court.

Witness my hand and the seal of said court at Indianapolis, September 16, 1869.

[SEAL.] J. D. HOWLAND, *Clerk.*

497 THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company, The City of New Albany, Thomas L. Smith, John D. McDonald, Jessie J. Brown, (survivor of James Brooks,) John S. Davis, Ezekial R. Day, Silas C. Day, Benj. F. Scribner, Horatio N. Duval, Thomas Danforth, Franklin Warren, William S. Culbertson, John B. Crawford, Ephraim S. Whistler, William Lockmiller, John Knefley, Bela C. Kent, Alexander Keeth, Michael C. Kerr, Isaac P. Smith, John H. McMahan, Laurence Bradley, James Montgomery, Samuel Montgomery, Asahel Claff, George V. Howk, John B. Anderson, Bradford E. Scribner, James Johnson, John F. Anderson, John B. Winstandley, and Jesse Brown and John B. Winstandley, executors of John Brown, deceased, & Augustus Bradley } Appeal.

vs.

JOHN PHELPS PUTNAM, HEMAN ELY, HEMAN Ely, executor of the last will & testament of C. Arthur Ely, deceased, and Stevenson Burke.

Of December term, in the year of our Lord, one thousand eight hundred & sixty-nine.

Afterwards, to wit, on the 1st Monday of December, in this same term, before the justices of the Supreme Court of the United States, at
498 the Capitol at the city of Washington, comes the said The City of New Albany, by Thomas A. Hendricks, her attorney, and says that in the record of proceedings aforesaid there is manifest error, in this, to wit, that the bill of complaint, and the matters therein contained, are not sufficient in law for the said complainants to have or maintain their aforesaid action and proceeding thereof against the said appellant.

There is also error in this, to wit, that the court admitted evidence for the complainants upon the hearing over the objection of the appellant, as appears by the exception thereto, taken at the time.

And there is also error in this, to wit, that by the record aforesaid it appears that the decree aforesaid given as for the said complainants against the appellant, whereas by the law of the land the said judgment and decree ought to have been given for the said appellant, and against the said complainants. And the said appellant The City of New Albany prays the judgment and decree aforesaid may be reversed, annulled, and altogether held for nothing, and that she may be restored to all things which she hath lost by occasion of the said judgment and decree, etc.

THOMAS A. HENDRICKS,
Att'y for Appellant.

(Indorsement on cover:) No. 313. The City of New Albany, appellant, vs. John Phelps Putnam, Heman Ely, Heman Ely, executor of C. Arthur Ely, dec'd, and Stevenson Burke. Indiana C. C. U. S.
Filed 6th December, 1869.

Supreme Court of the United States.

THE CITY OF NEW ALBANY,
vs.
JOHN PHELPS PUTNAM, *et al.*
No. 313.

Appeal from the Circuit Court of the United States for the District of Indiana.

Supreme Court of the United States.

THE CITY OF NEW ALBANY,
vs.
JOHN PHELPS PUTNAM, *et al.*
No. 313.

Appeal from the Circuit Court of the United States for the District of Indiana.

BRIEF FOR APPELLANT.

We can not more conveniently introduce this case than by presenting a somewhat full statement of the pleadings.

The references made will be to the printed copy; not to the transcript itself.

On the 29th of January, 1868, the appellees, Putnam, Ely (personally, and as executor of C. Arthur Ely, deceased,) and Burke, filed their bill in the Circuit Court against the New Albany & Sandusky City Junction Railroad Company, the appellant, Thomas L. Smith, and some thirty-three others.

The bill charged that on the 14th of November, 1857, William S. Pierson and Harvey Seymour, as trustees for said John Phelps Putnam, Heman Ely and C. Arthur Ely, Sarah Coit Day, Samuel J. Andrews, Catharine D. Andrews, Rollin C. Dewitt, Elijah Dewitt, George R. Starr, Horace C. Starr, and Augustus H. Moss, recovered judgment in the Floyd Circuit Court of Indiana against the New Albany & Sandusky City Junction Railroad Company for $54,855, and costs of suit, $1,051.60. The bill states the interest of these *cestuis que trust*, respectively, in the judg-

ment. That the interests of George R. and Horace C. Starr have been assigned to the appellee, Heman Ely; and that the interests of Sarah Coit Day, Samuel J. Andrews, Catharine D. Andrews, Rollin C. Dewitt, Elijah Dewitt and Alexander H. Moss, amounting to $21,735, had been assigned to the appellee, Stevenson Burke. These appellees, therefore, would show themselves to be sole owners of the judgment for $54,855 and costs.

The bill proceeds to show that the judgment was rendered in an action brought by one Victor A. Pepin against the New Albany & Sandusky City Junction Railroad Company, said Pierson and Seymour, as trustees, and James Montgomery and twelve others, the purpose of the action being the recovery against the railroad company of the amount due on one hundred and ten bonds of the company for $1,000 each, known as real estate bonds, the principle of which had fallen due July 1st, 1857, by reason of default in the payment of interest. That the judgment in favor of Pierson and Seymour, trustees above mentioned, was rendered upon agreement of parties, as the holders of fifty-three of the bonds. A foreclosure and sale of a mortgage executed to Pierson and Seymour, to secure all the one hundred and ten bonds, was also adjudged, the proceeds to be applied proportionately. That at a subsequent time, not specified, an order of sale, issued upon the judgment, under which the mortgaged lands were sold. That the proportionate proceeds of the sale, applicable to the $54,855 and costs, now owned by complainants, was $13,368.80 only, and that all the remainder remained unpaid. That at the May term, 1858, of the Floyd Circuit Court, a return of the sale was made, and on the 24th day of that month, an execution was duly awarded against the railroad company, to make the remainder due on the judgment. That at that time there was a remainder due upon the judgment of $42,720.41, as of March 30, 1858, with costs, amounting to $1,725.63. That the complainants had caused execution for the collection of the remainder of their judgment to issue to the sheriff of Floyd county, which had been returned, "no property found." That at the time of the rendition of the judgment, and ever since, the railroad company was and has been utterly insolvent.

The bill then proceeds to state that in 1855 and 1856 the railroad company commenced the construction of its road, doing a

considerable amount of work, in grading and otherwise; but that it never put any part of the road in operation, nor laid any track. That on the 30th of April, 1857, having expended all its means, and being utterly insolvent, the company abandoned all further efforts to build its road, and that since then its road-bed and right of way have been sold upon its indebtedness; and that since the year 1858 it has not kept up its organization, nor elected officers. That the appellant, the city of New Albany, is indebted to the railroad company in the sum of $393,000, with interest, payable semi-annually, since the 1st day of January, 1856, the principal of which will fall due January 1, 1874. That this indebtedness arose as follows: On the 19th of November, 1853, the city, by its mayor, subscribed $400,000 to the capital stock of the railroad company, to be paid in the bonds of the city, bearing six per cent. interest, payable semi-annually. That in part payment, the city had delivered its two hundred bonds, numbered from one to two hundred, for $1,000 each, with interest coupons annexed. Of these two hundred bonds, one hundred were delivered between the 25th of March and 9th of June, 1854, and the other one hundred on the 1st of January, 1856. That none of the interest has been paid, and that more than $70,000 of accrued interest is due to the company. That the city is also indebted to the company in the further sum of $200,000, the remainder of its subscription, with interest from January 1, 1856. That the city has never paid the subscription, nor the bonds, nor interest, except such sums of interest as fell due before January 1, 1856, and the interest on seven of the bonds; but by some pretended compromise between the city and the company, after its insolvency, the city obtained possession of the bonds, and procured an attempted cancellation of the subscription; but that the compromise and cancellation were without authority of law, and null and void.

The bill then proceeds to charge an indebtedness on the part of the natural persons, defendants, to the railroad company, upon individual subscriptions to the capital stock of the company—one class of them in the sum of $4,700 each, and another in the sum of $2,200 each.

The prayer of the bill is for an ascertainment of the amount due from the railroad company to the complainants, and that the city and the natural persons, defendants, as debtors to the

railroad company upon their stock subscriptions, be adjudged to pay an amount sufficient to satisfy complainants' claim. (pp. 1 to 6, record.)

The appellant, with other defendants, demurred to the bill, assigning as causes, want of jurisdiction and want of equity. (p. 11.)

The demurrer was argued before the Judge of the District Court, and was overruled. (p. 12.)

After the overruling of the demurrer, the appellant answered. The answer admits that on the 19th of November, 1853, a subscription was in form made to the capital stock of the New Albany & Sandusky City Junction Railroad Company of $400,000, payable in city bonds, upon the call of the company. A copy of the subscription, as executed by the mayor, is set out. (p. 13.) It is shown that the subscription was made pursuant to an ordinance of the Common Council of the city, passed on the 18th of November, 1853; reciting that three-fourths of the legal voters of the city had petitioned the Council to subscribe a sum not exceeding $600,000 in the New Albany & Sandusky City Junction Railroad Company, or in another railroad company, known as the Fort Wayne & Southern Railroad Company, incorporated for the building of a different road, or apportioning the subscription between the two companies, in the discretion of the Common Council, and ordaining that a subscription of $400,000 be made to the capital stock of the New Albany & Sandusky City Junction Railroad Company. (The ordinance is set out in the answer, pp. 13, 14.) That the Common Council assumed the power to pass the ordinance and subscribe to the stock from the 56th section of an act of the General Assembly of the State, entitled, "An Act for the incorporation of cities," approved June 18, 1852, which act and section were then in force, and that the same constituted the only pretense of authority for the passing of the ordinance, or the making of the subscription; but that neither that section, as the same has been construed by the final judgment of the Supreme Court of the State, nor any other law of the State, conferred the power, and that the ordinance and the subscription were therefore utterly void. That the respondent was advised that it was pretended and claimed by the complainants and others that the subscription was subsequently ratified by the Common Council, pursuant to power conferred by a subsequent

act of the General Assembly, entitled, "An Act to enable cities, which have subscribed for stocks in companies incorporated to construct works of public utility, under the 56th section of the general act for the incorporation of cities, and to ratify the same," approved February 21, 1855; but that the subscription had not been ratified by the city, and remained void.

That pursuant to that attempted subscription, the officers of the city afterwards issued and delivered to the railroad company two hundred bonds, purporting to be corporate bonds of the city, for $1,000 each. That at the time of thus delivering these bonds the railroad company was actively engaged in prosecuting its enterprise, and represented to the officers of the city that it was essential to the prosecution of its road to completion that the company should realize money by the sale of the bonds, but that shortly after the delivery of the bonds, and while all of them, except seven, still remained unsold, divers suits were instituted in the Floyd Circuit Court by citizens of the city to resist the payment of a tax levied by the Common Council for the payment of interest on the bonds, on the ground that the subscription had not been authorized by the petition of three-fourths of the voters.

That these suits led to protracted litigation, and raised such doubts as to the validity of the bonds, as to render it impossible for the railroad company to sell or negotiate them except at a ruinous sacrifice.

That on the 17th of August, 1857, the railroad company represented to the city that in consequence of this failure to realize on the bonds, the company had found itself without means to carry on the work, and had suspended and wholly abandoned its enterprise. That it had expended all the cash and real estate received by it in payment for stock, and had pledged all the two hundred city bonds (except the seven sold) to divers persons, for sundry amounts, borrowed from time to time, for the purpose of prosecuting the work. That it had no means whatever to pay the amounts so borrowed upon pledge of the city bonds, and that unless the city would provide such means the whole amount of the bonds would be sold for the payment of the loans, and that, owing to the doubts cast upon the validity of the bonds, the whole of them would not sell for

more than sufficient to pay the sums for which they were pledged.

The railroad company therefore proposed to the city that if the latter would provide means for the payment of the sums so borrowed, and redeem the bonds from the pledges, they should be returned to the city and cancelled.

That the city, relying on the representation of the railroad company as to the condition of its affairs, did, by ordinance of its Common Council, passed on the day last aforesaid, and duly published immediately thereafter, accept the proposition of the railroad company, upon condition that the latter would cancel the subscription of the city, and consent to the repeal of all ordinances and amendments relating thereto. That this condition was duly accepted by the railroad company, and that on the day last aforesaid the agreement was carried into effect.

That the city paid the sums of money for which the bonds were so pledged, amounting to more than thirty-six thousand dollars ($36,000.) That all the bonds, except the seven that had been sold, were returned to the city and cancelled, and that the subscription of stock was cancelled, and that since that time the city has not been a stockholder, nor been a debtor, of the railroad company.

That at the time this agreement was made, and the bonds and subscription cancelled, the railroad company represented to the city that, by the payment of said sums of borrowed money necessary for the redemption of the bonds from the pledge, all the debts and liabilities of the company would be extinguished.

That the city believed this representation to be true, and that it was true, unless it be so that the company remains liable for some amount on the one hundred and ten real estate bonds, secured by the Pierson and Seymour mortgage, upon which the complainants' claim is founded.

That the arrangement was made in the utmost good faith by the city without any intent to hinder or defraud creditors of the railroad company, and for the sole purpose of preventing the large amount of city bonds being sacrificed for the payment of the debts for which they stood pledged.

That the suits contesting the validity of the bonds were still pending, and that there was no possibility of their being de-

termined before the time when the debts for which the bonds were pledged were required to be paid.

That, but for the arrangement made, and the payment of said debts by the city, all the bonds would have been sold, and that by reason of the doubts cast upon their validity, the railroad company could not have realized from their sale enough, or more than enough, to pay the debts for which they stood pledged.

That neither the complainants, nor either of them, nor any other person, ever controverted the validity of the adjustment made between the city and the railroad company, nor instituted any suit or proceedings to have the same and the cancellation of the subscription set aside as fraudulent and void, as against creditors of the railroad company, until more than ten years after the same had been consummated, nor was the validity of that agreement and adjustment ever in any way called in question until the bill of complaint in this case was filed, more than ten years after the agreement was consummated, although the complainants well knew of the agreement and cancellation at the time they occurred.

The answer then proceeds to show the history of the real estate bonds, and mortgage securing them, and of the judgment upon them, in aid of which the bill was brought.

That the "real estate bonds" of the company being 110 bonds for $1,000 each, were issued September 20th, 1854. That they were secured by mortgage to Pierson, and Seymour, as trustees upon a large amount of real estate, appraised at $154,855 that had been taken by the railroad company in payment for stock. That the principal of the bonds was payable January 1, 1865, but that by supplemental agreement, it was provided, that upon failure to pay any installment of interest within sixty days after it should fall due, the principal of the bonds should become payable. That Pepin as holder of certain of the one hundred and ten bonds, brought suit for foreclosure to the October term, 1857, of the Floyd Circuit Court, making the railroad company, the trustees and others defendants. That the complainants, or those under whom they claim, and who then held fifty-three of the bonds, not being be-

fore the court, Pierson and Seymour, as trustees, answered for them, setting up their rights, and praying proper relief in the way of foreclosure.

That on the 14th of November, 1857, judgment of foreclosure was rendered. But the answer denies that in the judgment of foreclosure and sale of the mortgaged premises, any order was made that the remainder, if any, of the mortgage debt and costs that might remain unsatisfied after sale of the mortgaged lands, should be levied of any other property of the railroad company. It avers that no such order was asked for by the trustees, and that if any such step had been taken by them, looking to a collection upon general execution, it would have been outside the powers vested in them, they having no other connection with the bondholder, than as trustees of the mortgaged premises. That the supposed order awarding execution for the residue, after applying proceeds of sale of the mortgaged premises, was made at a term of that court, subsequent to the one at which final judgment was rendered. That the railroad company was not then present in court, and had not been summoned or notified, and was not subject to the jurisdiction of the court in that behalf, and that therefore, there was no record of the supposed award of execution in the complaint mentioned.

The answer then proceeds to show a judgment subsequently rendered against the complainants in the Floyd Circuit Court, in respect of the same money they seek to recover in this cause.

It avers that after the rendition of the judgment of foreclosure in the Pepin case, November 14th 1857, the holders of the fifty-three bonds represented in that suit by the trustees Pierson and Seymour, being the same persons under whom complainants claim, assumed the direction and control of the judgment rendered in favor of the trustees for their use. That pursuant to an agreement between them and the other bondholders, nearly all the property embraced in the foreclosure, was bid off at the sale by Pepin and Kerr, and conveyed to them in trust for all the bondholders provided for in the judgment. That the railroad company was also the owner of a large amount of real estate, other than that included in the mortgage to Pierson and Seymour, and that this other real estate had been mort-

gaged to certain of the same bondholders, other than the complainants or their assignors, as an additional security for the bonds held by themselves.

That at a subsequent sale of this additional property covered by this second mortgage, by agreement with the parties interested in this second mortgage, and with the consent of the railroad company, the same was bid off by the complainant, Heman Ely, to the end, that all the property included in both mortgages might be thrown into a common fund, for the payment of all the bonds secured by the first mortgage. That Ely's bid was for the benefit of all these parties, and that he paid nothing upon it, and that this additional property so bid off by Ely, at a nominal sum, for the common benefit was valued and taken by the parties at ten thousand dollars.

That all the property so bid in under both mortgages was partitioned among all the bondholders, and that the parties, here represented by the complainants, received, therefore, a larger amount of property than they would have received had they not been admitted to participate in the second mortgage. That the aggregate value of the property received by them, as fixed by the estimates of the parties themselves, was $25,698. That the complainants, or those they represent, have ever since been, and still are, in possession of all said property.

That afterward, on the 19th of February, 1863, one William Lindley filed in said Floyd Circuit Court, of the State of Indiana his complaint against the railroad company, the complainants Putnam and Ely, said Samuel J. Anderson, Sarah C. Day, Elijah Dewitt, Rollin C. Dewitt, George R. Starr, Horace C. Starr, C. Arthur Ely (then living), and Augustus H. Moss (being the persons who then held the same interests now claimed by the complainants, as assignees), and others.

That said Lindley, in his complaint, averred, among other things, that he was the owner of three of the real estate bonds secured by the mortgage to Pierson and Seymour, trustees, (who were also made parties.) That he filed copies of his bonds and of the mortgage (as prescribed by the State Code.)

The prayer of his complaint was for judgment upon the bonds, and for foreclosure of the mortgage. As to the defendants named in Lindley's complaint, they were made such because, as the complaint averred, they claimed some interest in the subject

of the action. But that suit was brought by the plaintiff, Lindley, "for himself and for all others holding bonds similar in character to the three held by him of the one hundred and ten hereinafter mentioned."

[It may here be suggested that, although these three bonds had been provided for in the former foreclosure—that of 1857—Lindley, who was the real owner, was not a party, and received no portion of the proceeds. Another person, without right, had represented those three bonds as their owner. Hence Lindley, not being bound by that proceeding, ignored it, and brought a new suit to foreclose. These facts, substantially, transpired in the progress of Lindley's suit.]

That said Floyd Circuit Court had full jurisdiction of the subject matter, and also by its process, and by appearance, acquired complete jurisdiction of the parties.

That afterwards, at the May term, 1864, of that court, said Putnam and others, then owning the identical interests now claimed by the complainants—the appellees—filed their joint answer and cross complaint against the plaintiff, Lindley, and their co-defendants, including the railroad company, in which, among other things, they set up the former foreclosure and sale under it, and averred that the proceeds of the sale had been wholly insufficient to pay their claims (being the identical claims mentioned in the complaint in this case), and that they had never received from the railroad company anything except certain of the lands embraced in the foreclosure, that had been set off to them as their portion of the lands sold under it, and that the whole balance of the former judgment, as shown by the report of the commissioner who made the sale under it, remained unpaid. That upon this answer and cross complaint, issue was taken by Lindley and the railroad company.

That at a subsequent term of said Floyd Circuit Court, each of the complainants in this cause appeared in his own right in the Lindley case and filed other answers.

By these answers they also ignored the former foreclosure, and set up the same bonds upon which the former judgment, under which they are now claiming, had proceeded, and prayed for judgment on the bonds and for foreclosure of the mortgage, joining with the plaintiff, Lindley, in the prayer of his complaint for relief.

That that cause was still pending in the State court when this bill was filed in the Federal Circuit Court.

That afterwards, on the 19th day of Febr... issues in the Lindley cause in the State Court ... the parties thereto, and the question as to the p... isfaction of said residue of said bonds being at ... was submitted to the court for trial and judgmen...

That after hearing the evidence adduced, th... other things, found that by agreement of the ... former foreclosure proceeding (comprising, among others, the complainants and those whom they represent aforesaid), who were then the holders of the real estate bonds, and the railroad company, the said mortgage premises were received by them in full payment, satisfaction and extinguishment of all claims and demands against the railroad company, or any other person, upon said bonds and mortgage, and in full payment satisfaction and extinguishment of the judgment of foreclosure rendered thereon. And as to the complainants in this cause, and as to all the other parties to the Lindley suit, except the plaintiff, Lindley himself, claiming to be holders and owners of any of the bonds, and seeking judgment thereon, the court found in favor of the defendants to their respective claims or complaints therein, and that said claimants, and each of them, had no equities whatever, and were not entitled to any relief in said action. And that thereupon it was by said Floyd Circuit Court finally ordered adjudged and decreed in said cause, among other things, that the said John P. Putnam, Heman Ely, Stevenson Burke, Heman Ely as executor of the last will of C. Arthur Ely, deceased, as well as the other defendants in said judgment of foreclosure, who had in like manner claimed to be holders of certain of the real estate bonds, and had in like manner prayed relief in said cause, should take nothing by their suits therein and that as to each of their claims or complaints therein the defendants thereto should go thence thereof without day. (pp. 12 to 22.)

The railroad company answered, setting up among other things the composition between the holders of the real estate bonds, as between themselves and the company; also the pro-

of the action. But that suit was brought by the plaintiff, Lindley, "for himself and for all others holding bonds similar in character to the three held by him of the one hundred and ten hereinafter mentioned"

[It may here be suggested that, although these three bonds had been provided for in the former foreclosure—that of 1857—Lindley, who was the real owner, was not a party, and received no portion of the proceeds. Another person, without right, had represented those three bonds as their owner. Hence Lindley, not being bound by that proceeding, ignored it, and brought a new suit to foreclose. These facts, substantially, transpired in the progress of Lindley's suit.]

That said Floyd Circuit Court had full jurisdiction of the subject matter, and also by its process, and by appearance, acquired complete jurisdiction of the parties.

That afterwards, at the May term, 1864, of that court, said Putnam and others, then owning the identical interests now claimed by the complainants—the appellees—filed their joint answer and cross complaint against the plaintiff, Lindley, and their co-defendants, including the railroad company, in which, among other things, they set up the former foreclosure and sale under it, and averred that the proceeds of the sale had been wholly insufficient to pay their claims (being the identical claims mentioned in the complaint in this case), and that they had never received from the railroad company anything except certain of the lands embraced in the foreclosure, that had been set off to them as their portion of the lands sold under it, and that the whole balance of the former judgment, as shown by the report of the commissioner who made the sale under it, remained unpaid. That upon this answer and cross complaint, issue was taken by Lindley and the railroad company.

That at a subsequent term of said Floyd Circuit Court, each of the complainants in this cause appeared in his own right in the Lindley case and filed other answers.

By these answers they also ignored the former foreclosure, and set up the same bonds upon which the former judgment, under which they are now claiming, had proceeded, and prayed for judgment on the bonds and for foreclosure of the mortgage, joining with the plaintiff, Lindley, in the prayer of his complaint for relief.

That that cause was still pending in the State court when this bill was filed in the Federal Circuit Court.

That afterwards, on the 19th day of February, 1868, the issues in the Lindley cause in the State Court being joined by the parties thereto, and the question as to the payment and satisfaction of said residue of said bonds being at issue, said cause was submitted to the court for trial and judgment.

That after hearing the evidence adduced, the court, among other things, found that by agreement of the parties to the former foreclosure proceeding (comprising, among others, the complainants and those whom they represent aforesaid), who were then the holders of the real estate bonds, and the railroad company, the said mortgage premises were received by them in full payment, satisfaction and extinguishment of all claims and demands against the railroad company, or any other person, upon said bonds and mortgage, and in full payment satisfaction and extinguishment of the judgment of foreclosure rendered thereon. And as to the complainants in this cause, and as to all the other parties to the Lindley suit, except the plaintiff, Lindley himself, claiming to be holders and owners of any of the bonds, and seeking judgment thereon, the court found in favor of the defendants to their respective claims or complaints therein, and that said claimants, and each of them, had no equities whatever, and were not entitled to any relief in said action. And that thereupon it was by said Floyd Circuit Court finally ordered adjudged and decreed in said cause, among other things, that the said John P. Putnam, Heman Ely, Stevenson Burke, Heman Ely as executor of the last will of C. Arthur Ely, deceased, as well as the other defendants in said judgment of foreclosure, who had in like manner claimed to be holders of certain of the real estate bonds, and had in like manner prayed relief in said cause, should take nothing by their suits therein and that as to each of their claims or complaints therein the defendants thereto should go thence thereof without day. (pp. 12 to 22.)

The railroad company answered, setting up among other things the composition between the holders of the real estate bonds, as between themselves and the company; also the pro-

ceedings and decree in the Lindley suit; also the laches of the complainants. (pp. 22, 23, 24.)

The natural persons, defendants, also answered. We suppose, however, that no examination of that answer is necessary in developing the questions that the appellants desire to bring before this court. Their answer appears on pages 24 to 27 of the printed record.

The complainants, without amending their bill, filed the general replications. (pp. 30, 31.)

DECREE.

At the June term, 1869, the cause was submitted to the court —Mr. Judge McDonald, of the District Court, occupying the bench—on pleadings, exhibits and evidence, and on the default of two of the defendants, Silas C. Day and Ezekiel R. Day.

On the 1st of July, 1869, a decree was rendered dismissing the bill as to all of the defendants, except the railroad company, the city and the two Days. It ascertained that there was due to complainant Burke, $27,882; to complainant Ely, as executor, $18,522; to complainant Ely, personally, $15,875, and to complainant Putnam, $7,937. That there was due from the city to the railroad company the sum of $100,000 and more on its subscription for the stock of the railroad company, bonds and interest coupons, as alleged in the bill; that there was due from E. R. Day to the railroad company $6,230, and from S. C. Day to the railroad company $3,026; and that enough of said several sums to satisfy complainants' claims should be so applied. It was therefore ordered and decreed that the city, within thirty days, pay to the clerk the several amounts found due to the complainants; that E. R. Day, within thirty days, pay to the clerk $6,230, and interest; that S. C. Day, within thirty days, pay to the clerk $3,026, and interest. That in default of payment, several executions issue for the collection of these several sums. That on payment by the two Days, the money should be applied on complainants' claims, *pro rata*, and that execution should issue against the city for the amount that might remain unpaid only. And that upon payment by the city, either voluntarily or upon execution, of the full amounts due the several complainants, no execution should issue against the Days.

The evidence is somewhat voluminous, and some portions of it are not, perhaps, very material. We will not attempt to present any connected abstract of it, but will endeavor to collate all of it that is material to each of the several questions of fact that we propose to discuss, in connection with the discussion of the respective questions.

There is not, indeed, very much controversy in this case as to what the facts are. The chief controversy is rather as to the legal effect of undisputed facts. It may be stated generally, that the material facts set forth in the answer of the appellant are established by the evidence.

The propositions that we desire to present are these:

First. That the Circuit Court erred in overruling the demurrer to the complaint, for the reasons, 1st, that the court had not jurisdiction of the subject-matter; 2d, that the bill made out no case for equitable relief; and, 3d, that the remedy against an insolvent corporation, under the laws of Indiana, should be by sequestration and the appointment of a receiver, not by creditor's suit.

Second. That upon the facts disclosed by the answer and the evidence, the complainants have no valid subsisting claim against the railroad company, and that they are precluded by the Lindley judgment.

Third. That upon the facts disclosed by the answer and the evidence, the appellant is not indebted to the railroad company; that the adjustment by the city and railroad company was not a voluntary release voidable at the instance of creditors of the company, but a compromise made in good faith, upon a good consideration, and valid as against all persons.

Fourth. That upon the showing of bill, answer, exhibits and evidence, the complainants have slept so long upon the rights they assert, that their laches, alone, would deprive them of any right to equitable relief.

Fifth. That upon facts disclosed by the evidence, there is a defect of necessary parties to the bill.

I. We submit that the demurrer to the bill should have been sustained:

First, because the court had no jurisdiction of the subject-matter.

In this bill the complainants set up a judgment recovered by

them, or by those to whose rights they claim to have succeeded by purchase, in the State Court in 1858, and they seek to subject certain assets to the satisfaction of that judgment.

Before the rendition of the judgment, or at least before service of process, the right of jurisdiction, if the parties resided in different States, vested in the Federal Court and the State Court concurrently.

When the matter was submitted to the State Court, its jurisdiction became exclusive.

"There is no principle better settled than that, when two or more tribunals have a concurrent jurisdiction over the same subject-matter and the parties, a suit commenced in any one of them may be pleaded in abatement to an action for the same cause in any other." Shelby *v.* Bacon, 10 How., on p. 68; Taylor *v.* Carryl, 20 How., on pp. 594 to 597; Freeman *v.* Howe, 24 How., 450.

In Riggs *v.* Johnson County, 6 Wall., 166, the Court say: "Undoubtedly Circuit Courts and State Courts, in certain controversies between citizens of different States, are courts of concurrent and co-ordinate jurisdiction, and the general rule is, that as between courts of concurrent jurisdiction, the court that first obtains possession of the controversy, or of the property in dispute, must be allowed to dispose of it without interference or interruption from the co-ordinate court." In his dissenting opinion in that case, Mr. Justice Miller expresses a similar opinion, so far as this point is concerned, (p. 204.)

Another legal proposition has received equally as explicit recognition in this court, viz.: That when one of two or more courts of concurrent and co-ordinate jurisdiction, has obtained possession of the controversy, its jurisdiction is not exhausted by the rendition of judgment, but continues until satisfaction of the judgment. Wayman *v.* Southard, 10 Whea., on pp. 4, 5.

In Riggs *v.* Johnson county, 6 Wall., above cited, the Court say: "Express determination of this court is, that the jurisdiction of the court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied." Page 187.

The State Court to which the cause of the complainants had been submitted, was one of ample jurisdiction. The laws of the State had abolished the distinction between common law

and chancery proceedings, and had committed both classes of causes to the same court to be prosecuted in one and the same form of action, designated as a civil action. It was, therefore, competent for the complainants (and they claim to have done it) to take a decree of the Floyd Circuit Court for the foreclosure of the mortgage, and to have the mortgage property sold on a special execution provided by law, viz., a certified copy of the decree; and at the same time to take a judgment over for any excess that might remain after sale of the mortgage property, to be collected upon the ordinary writ of execution. In addition to this, the "proceedings supplementary to execution" provided by the State laws (2d Gavin & Hord, p. 260), make ample provision for reaching all kinds of property and choses in action of the execution defendant that could not be taken directly, upon the execution, and applying them to the satisfaction of the judgment, and this may be done cheaply and summarily.

The defendants to this bill and the assets that the bill proposes to subject, are all within reach of the process of the Floyd Circuit Court and subject to its jurisdiction. But the complainants, after having committed their cause to that forum, and taken judgment there, propose to withdraw from its jurisdiction and commit the enforcement of the judgment to another tribunal.

We submit that the jurisdiction of the State Court had become exclusive, and that it was not competent for the Federal Court to entertain jurisdiction of any question connected with the enforcing of the judgment.

This is a judgment creditor's bill. The sole purpose of it is to aid execution of the judgment, by subjecting assets that an ordinary execution would not reach. It is not an original and independent suit, as was the old creditor's bill, to subject assets in the hands of an executor or administrator. It is but a suppletory proceeding, auxiliary to the judgment of the State Court. The debt claimed is merged in judgment. The judgment itself is the debt, and the purpose of this bill is to obtain the fruits of it.

The case of Hatch *v.* Dorr, in the United States Circuit Court, Michigan, (4 McLean, 112,) was upon a creditor's bill, brought in aid of a judgment recovered in that court. The complainant

and the defendant were both residents of Michigan. Ojection to the jurisdiction was taken upon demurrer to the bill. After defining the nature of original bills, Mr. Justice McLean held: "According to this definition, a creditor's bill is a continuation of the former controversy, so far as the fruits of the judgment are concerned. The complainant asks the aid of the court to reach the assets of the defendant, so as to be made liable to his judgment, which assets have been secreted or fraudulently assigned, to defeat the judgment." The demurrer was overruled and jurisdiction entertained.

The jurisdiction was of the subject matter of the creditor's bill, and irrespective of the residence of parties.

By parity of reason, the jurisdiction of the subject matter of this bill is vested in the Floyd Circuit Court. The fact that the parties to this bill reside in different States can not confer a concurrent jurisdiction upon the Federal Court, when jurisdiction of the subject matter had already vested exclusively in the State Court.

Randall *v.* Howard, 2 Black, 585, was upon a bill brought in a Federal Court, to define a title acquired by defendant under the foreclosure of a mortgage in a State Court. This Court held that there was no jurisdiction.

In Minnesota Co. *v.* St. Paul Co., 2 Wall, 631, the jurisdiction of the Federal Court was maintained, upon the ground that the suit was but a continuation of a former one, of which the court had jurisdiction.

In the case of Riggs *v.* Johnson Co., 6 Wall, 166, referred to above, it was in consideration whether a mandamus might issue from a Federal Circuit Court to the Commissioners of a county, to compel them to levy a tax for the payment of a judgment previously rendered by the court against the county, the commissioners having been enjoined from levying any such tax by a State Court, after the rendition of the judgment.

The court held that the writ of mandamus might issue from the Circuit Court in a proper case, where it might be necessary to the exercise of its jurisdiction, but that when so employed it is neither a prerogative writ, nor a new suit, in the jurisdictional sense. "On the contrary, it is a proceeding ancillary to the judgment which gives the jurisdiction, and when issued becomes a substitute for the ordinary process of execution to enforce the

payment of the same, as provided in the contract." (p. 198.) It was held that no action taken in the State Court could be permitted to interfere with the vested jurisdiction of the Federal Court, and that the mandamus would lie.

Rogers *v.* Rogers, 1 Paige, 183, was for injunction to obtain the benefit of an equitable defense to a note in suit in a State Court. A motion to remove the injunction suit to the Federal Court was refused, on the ground that this, though in form an original proceeding, was in fact but an equitable defense to a suit pending in the State court; that the State court had acquired exclusive jurisdiction. The Chancellor observes: "If the petitioners were not willing to trust their rights to the decision of the tribunals of this State, they should have brought their suits in the United States Court, and the complainants would then have been compelled to resort to the same tribunal for the purpose of interposing their equitable defense. Having resorted to the State Court for justice, they must be content to take such measure of justice as the law and equity courts of this State mete out to them. The petition must be dismissed, with costs." If the State Court in which complainants' judgment was rendered had no jurisdiction to grant the relief sought by the bill, the case would be different. But it had and has the most ample jurisdiction. It is a court clothed with chancery as well as common law powers. The relief here sought on the chancery side of the Federal Circuit Court is in aid of a decree rendered in the State Court in a chancery cause. It was a foreclosure proceeding.

We have met with no case where such a bill has been entertained, and the attention of the Court called to the question of jurisdiction.

So far as we have been advised, it is attempted to maintain jurisdiction upon the authority of one or two decisions of this Court, holding that the Federal Court held in a State may entertain a bill to enforce satisfaction of a judgment of a State Court of another State. But that, we submit, presents an essentially different question. There the relief sought would not be within, but quite beyond the jurisdiction of the court rendering the judgment, the subject matter being beyond the territorial limits of its powers. In such a case it is a question of comity, and not of conflict.

Second. The demurrer should have been sustained, because the bill discloses no indebtedness on the part of the city to the railroad company, and therefore no equitable reason for requiring the city to pay the complainants' debts.

The city of New Albany is incorporated under the public laws of the State, and all its corporate powers are therefore within the judicial notice of the court.

The bill avers that the city is indebted to the New Albany & Sandusky City Junction Railroad Company by reason of a subscription of $400,000 to the capital stock of the company, made by the city, by its mayor, on the *19th day of November*, 1853. The bill does not pretend to show any indebtedness of the city, other than by virtue of the subscription thus then made.

The State law of June 18, 1852, entitled, "An Act for the incorporation of cities," was in force at the time this subscription was attempted, and is the law by which its validity must be determined. That act having been repealed in 1857, it is not published in the Gavin & Hord edition of the statutes, but is found in 1st Rev. Stats., 1852, p. 203. The 56th section of the act is as follows: "No incorporated city under this act shall have power to borrow money, or incur any debt or liability, unless three-fourths of the legal voters shall petition the Common Council to contract such debt or loan, and for any debt created thereby, the Common Council shall add to the tax duplicate of each year successively a levy sufficient to pay the annual interest on such debt or loan, with an addition of not less than five cents on the one hundred dollars, to create a sinking fund for the liquidation of the principal thereof."

This was the provision under which the city assumed to make the subscription. It has been often held that the distinct grant of a corporate power carries with it, by implication, the grant of all powers necessarily incidental to its execution. But here the rule of interpretation indulged was different. It was assumed that the power to borrow money implied the power to do any act that a person or corporation otherwise competent could do with money when borrowed.

Other cities besides this one reasoned and acted in the same way. The question came before the Supreme Court of the State in the case of Cox *v.* the City of LaFayette, 5 Ind. Rept's,

38, and it was of course held that the provisions relied on granted no such power to cities.

That decision has ever since been accepted as correct. Since it was rendered, no person, city or court has claimed that the act of 1852, or any other law in force at the time of this subscription, authorized cities to subscribe to the stock of railroad companies.

That the bill, for this reason, was and is wholly void of equity, as against the appellant, is beyond doubt.

It is suggested that this manifest defect in the bill was cured by the answer and replication.

The answer states that the authority to subscribe was referred to the 56th section of the act of 1852; that the respondent was advised that it was pretended and claimed by complainants and others that the unauthorized subscription had been ratified by the Common Council, pursuant to a subsequent enabling act of the Legislature, approved February 21st, 1855. But the answer denied that any ratification had ever been made, and averred that the subscription remained unauthorized and void

It was anticipated by respondent that the answer would induce an amendment of the bill, in accordance with No. 45 of the equity rules, setting up subsequent proceedings of the City Council, professing to ratify, and that thus a distinct issue would arise upon the question of ratification. But instead of amending their bill, in accordance with a necessity that had now become manifest, if a ratification were to be relied on, the complainants interposed the common replication.

We submit that any interpretation of these pleadings that would deduce a proper issue upon the question of ratification would do violence to the rules of legal logic.

It can not be said that the answer supplies the defect by admitting a ratification, for it expressly denies it.

It can not be said that the replication affirms it, for under the 45th rule it is not the function of a replication to plead any new fact, and in this case it does not profess to do so. It only professes to aver the truth and sufficiency of the bill, and the untruth and insufficiency of the answer, and to deny each statement of the answer except those admitting the bill to be true.

This may amount to a denial that the supposed authority for

the subscription was derived from sec. 56 of the act of 1852, and it may amount to a denial that it was "pretended and claimed by the complainants and others" that there had been a subsequent ratification. It not only does not aver a ratification, but it denies that complainants relied upon such, or ever claimed or pretended that such had been made.

If a declaration, or a bill filed for the recovery of money, charged a promise to pay without stating any consideration for the promise, it would be supposed subject to demurrer. But if, after the overruling of a demurrer, the defendant should answer, saying that the promise was without any good consideration; that the plaintiff pretended it was for goods sold and delivered, but that there had in fact been no sale or delivery of goods; and if to this answer there should be a replication simply denying the plea, we would have an issue similar in principle to the one under consideration. This, upon the rule of interpreting issues that is here contended for, would amount to a good issue, joined as to the sale and delivery of goods.

We submit that in the presence of the demurrer, this defect is fatal to the bill, so far as it relates to relief against the city of New Albany; that the defect could be cured only by an amendment of the bill; that every fact essential to the complainants' title to the relief prayed for must appear in their own pleadings.

* * "Every fact essential to the plaintiff's title to maintain the bill and obtain the relief must be stated in the bill, otherwise the defect will be fatal, for no facts are properly in issue unless charged in the bill; and of course no proofs can be generally offered of facts not in the bill. Nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence, for the Court pronounces its decree *secundum allegata et probata.*" * * (Story's Eq. Pleadings, sec. 257.)

"The rule even proceeds farther, for if an admission be made in the answer it will be of no use to the plaintiff, unless it is put in issue by some charge in the bill; and the consequence is that the plaintiff is frequently obliged to ask leave to amend his bill, although a clear case for relief is apparent upon the face of the pleadings. This would occur, for example, when a bill is brought against an executor for an account, and it prays an account of the personal estate of the testator, but it does not charge

any acts of mismanagement or misconduct in the executor, but simply charges that he has received assets. In such a case, although the answer should disclose gross acts of mismanagement or willful negligence or default, whereby assets had not been received, yet no decree for an account upon such matters could be obtained upon a bill so framed, for it would not be matter in issue." (Id., sec. 264.)

In Pratt *v.* Vattier, 6 Pet. 405, the defendants, in their answer, set up a statute of limitations of Ohio. The evidence, as it was claimed, showed the non-residency of complainant's grantor, which fact, properly appearing, would place the case within an exception to the statute. But the fact was not stated either in bill or replication. The Court say, (p. 415) "But the difficulty is that the non-residence and absence are not charged in the bill, and, of course, are not denied or put in issue by the answer; and unless they are so put in issue, the Court can take no notice of the proofs; for the proofs, to be admissible, must be founded upon some allegation in the bill and answer."

In this connection it will be convenient and conducive to brevity, to take up two points in the case, not raised by the demurrer.

First. We submit that the Court erred in admitting the ordinance of the Common Council of the city, passed March 7, 1855, as evidence tending to show a legal ratification of the subscription.

Second. We submit that the attempted ratification, assuming it to be in issue, was not in conformity with the enabling act of the Legislature, and that it was, therefore, wholly inoperative.

The substance of the record, so far as it relates to these two matters of fact, is this:

The subscription, as already mentioned, was made November 19th, 1853. It was for $400,000 and unconditional in its terms. On the 21st of February, 1855, an act of the Legislature was approved, to the effect that the Common Council of any city that had contracted obligations or liabilities, by subscription to such stock, on the written petition of three-fourths of the legal voters, under the provisions of the 56th section of the Act of 1852, upon the supposition that that section authorize the subscription, might at any time after the passage of the act, ratify

and affirm the subscription. This, though a public law, was proved by complainants as a fact, and is spread upon the record. (pp. 64, 65.)

The ordinance to ratify was passed March 7th, 1855. It recites the subscription and that it had been made as under the 56th section of the act of 1852, upon the supposition that it was authorized by that section. It also recites the adoption of a resolution by the board of directors of the railroad company, and the communication of the resolution to the Common Council, to the effect that if the subscription should be then ratified and affirmed by the Council, under the provisions of the enabling act of February 21st, 1855, "the calls for the payment of the installments on said stock shall not exceed $250,000 until the road shall have been completed and put in running order at least to its junction with the Ohio and Mississippi Railroad, and the remaining installments shall only be called for and used for the purpose of furnishing the road with rolling stock, depots, and the necessary machinery and appliances for running said road, or said portion of it: *and that said order shall be irrevocable if said subscription be ratified.*"

After thus reciting, the ordinance proceeds in terms to ratify the subscription. (pp. 65, 66.)

The ordinance was admitted over an objection made by defendant, that it was irrelevant and incompetent under the issue joined. An exception was taken, and by agreement, stated in the record, without a formal bill of exception. (p. 66.)

The defendant afterwards introduced the resolution in full, of the board of directors of the railroad company, recited in the ordinance. (p. 87.)

This was all the evidence relating to the subject of ratification, except some transcripts from the records of the proceedings of the Common Council. These indicate that the city voted as a stockholder in the railroad company in the fall of 1855 and the fall of 1856. (pp. 68 to 71.)

As to this first question—the admission of the ordinance to ratify: If we are correct in the position taken, that the complainants' bill contains no proper averment of ratification, and that no issue upon that point was made, it must follow that this ordinance should not have been admitted as evidence.

As to the second question—that the attempted ratification was not in conformity with the enabling act: Aside from the objection growing out of the want of an issue, we submit that this ordinance operated no ratification.

The subscription of November 19th, 1853, was for $400,000, payable in the bonds of the city, and the whole payable unconditionally. No time for payment was fixed by the contract of subscription, except that the bonds were to be delivered upon call of the company. Those things were left to the operation of the general railroad law of the State, under which the company was organized. (1st G. & H. p. 504.)

The eighth section of that act prescribed the time and conditions of payment, as follows:

"It shall be lawful for the directors to call in and demand from the stockholders respectively, any sums of money by them subscribed, in such payments or installments as the directors shall deem proper, under the penalty of forfeiting the shares of stock subscribed for, and all previous payments made thereon, if payment shall not be made by the stockholder within thirty days after personal demand or notice, requiring such payment, shall have been made in each county through which such road shall be laid out, in which a newspaper shall be published:

Provided, That subscriptions shall not be required to be paid except in equal installments of not more than ten per cent. a month."

The subscription of November 19, 1853, was, therefore, an unconditional subscription of $400,000, payable in bonds, upon call of the railroad company. As it stood then, it was utterly void. The enabling act of February 21, 1855, empowered the Common Council to ratify it, but it granted no other power. It authorized the making of no new subscriptions, of that nature, by cities. It did not authorize material alterations in the terms and conditions of such subscriptions, and a ratification of the void contracts as thus modified. The power to do that would in effect be a power to make a new contract, and would open a wider door than the Legislature intended. That body must be supposed to have known what cities had assumed to make such subscriptions, and what contracts they had made. It simply invested them with an optional power to ratify—nothing more. It did not authorize them either to increase or to diminish a

subscription made, or to change its character making it neither more or less onerous than the original contract would have made it. The Common Council of New Albany had the option either to ratify the contract of November 19, 1853, or to permit it to remain as it was before—a mere nullity. It was simply a question of power.

In this case the railroad company, as an inducement to the city to ratify, adopted and submitted to the Common Council a proposition, declared irrevocable in case of ratification by the city, that $150,000 of the subscription should be payable only upon a certain contingency, and should then be applicable only to a special purpose.

This proposition or resolution is recited in the ordinance to ratify, and clearly constitutes a condition of ratification. After its passage there was either no valid subscription at all, or a conditional one only, essentially different from the terms of that of Nov. 19, 1853.

If we were defending an action upon negotiable bonds issued upon the subscription, as in Bissell *v.* City of Jeffersonville, 24 How., 284, the question would be a very different one. The policy of the Law Merchant might forbid that the ratification should be questioned. But here no consideration of that kind intervenes. The liability of the city is predicated of the subscription itself, and the question as to its validity and binding force is entirely free and open.

Third. We submit that the demurrer to the bill should have been sustained for the further reason that, under the general law of Indiana relating to corporations, an ordinary creditor's suit, to subject assets of an insolvent corporation, will not lie, but that the remedy should be a sequestration of its stock and effects, and the placing of its business in the hands of a receiver.

Aside from any provision of statute law, this mode of subjecting the stock subscriptions of an insolvent corporation would seem to commend itself to equitable favor. Other debts are payable at all events. The debtor owes the money whether his creditor is solvent or insolvent. It is immaterial to him who receives the money, so that he is discharged by the payment. But the debt of a stock subscriber to his corporation, is different. As between him and the corporation he owes nothing except

what is needed for its purposes, and that only as called for. If the corporate enterprise fails, he is liable to be called upon only for such proportionate amount as may be required for the discharge of existing obligations. The entire stock stands pledged for the debts, so far as creditors are concerned. But it should be realized by a *pro-rata* assessment upon the solvent stock-subscriptions. This is the extent of his legal or equitable liability. He does not owe this directly to the creditor of the corporation, but the creditor's rights must be worked out through the corporation, or by some agency—a trustee or receiver—clothed, either by assignment or by judicial decree, with the function of the corporation in that behalf. The equitable right of the creditors, is that a sufficient amount be realized from the outstanding subscriptions, to pay all debts. The legal duty of the corporation is to raise that amount by a *pro-rata* assessment. If it fails to do this, or if it is unfit to be entrusted with the duty, ample power is vested in the Court to enforce performance, but it can only be accomplished through the intervention of a receiver, or some agency of equivalent functions. It can not be attained through an ordinary creditors' suit. The equities in such case are too complex and involved to be susceptible of adjustment in that mode. To allow any one creditor to secure a preference by creditors' bill in a case where the law prescribes the appointment of a receiver for the common benefit of all creditors as well as of all stockholders, is not equality; and to require a single stock subscriber to pay all the debts, without requiring rateable contribution from his associates, is to enforce against him an obligation not involved in his contract of subscription, and is simply oppressive. In this case the bill does not profess to be filed for the benefit of other creditors, though it sufficiently appears that if complainants are creditors, there are other creditors of the same class. Nor does the bill profess to have brought all the stock subscribers before the Court, while the evidence shows that Sebra and Charles Howard, who were not parties, had subscribed $300,000.

The State laws proceed upon this theory. Sec. 199 of the code, (2 G. & H. p. 151,) provides that "A receiver may be appointed by the Court in the following cases: * * * *

Fifth. When a corporation has been dissolved, or is insolvent,

or is in imminent danger of insolvency, or has forfeited its corporate rights."

The 16th section of "An act establishing general provisions respecting corporations,' (1 G. & H. p. 267,) is as follows:

"Whenever any judgment against any corporation, other than banking, shall have remained unpaid for the space of one year after the rendition thereof, and execution thereon is not stayed by appeal or supersedeas, the Circuit Court of the proper county shall have power to declare the franchise of such corporation forfeited, and appoint a receiver, who shall give a bond, and reduce the assets of such corporation to possession, and pay the debts thereof, *under the same rules prescribed for the government of administrators.*"

This statute was in force when this railroad company was organized and is a law governing it.

The rules for the government of administrators under which the debts are to be paid, are the following: "All claims against the estate of a decedent shall be paid in the following order: *First.* Expenses of Administration; *Second.* Expenses of last sickness, and funeral expenses; *Third.* Judgments which are liens on the decedent's real estate, and mortgages of real and personal property existing in his life time; *Fourth.* General debts; *Fifth.* To legatees; *Sixth.* To distributees." (2 G. & H., p. 516.)

Where the estate is insolvent the order of distribution is as follows: * * * * * * * "The Court shall direct a distribution of the money of such estate among the claimants whose claims have been allowed, in the order herein before provided (that given above) *pro-rata*, among the claimants of each class * * *." (2 G. & H., p. 521, Sec. 129.)

The statutes of the State of New York, upon this subject, and which have received judicial construction, are the same in principle as the Indiana statute.

"S. 44 [Sect. 36.] Whenever a judgment at law or a decree in equity shall be obtained against any corporation incorporated under the laws of this State, and an execution issued thereon shall have been returned unsatisfied in part or in the whole, upon the petition of the person obtaining such judgment or

decree, or his representatives, the Supreme Court may sequestrate the stock, property, things in action, and effects of such corporation, and may appoint a receiver of the same.' (Rev. Stats. N. Y., Banks & Bros., 5th Ed., Vol. III., p. 763.)

"S. 45 [Sec. 37.] Upon a final decree on any such petition, the Court shall cause a just and fair distribution of the property of such corporation and of the proceeds thereof to be made among the fair and honest creditors of such corporation, in proportion to their debts respectively, who shall be paid in the same order as provided by this title, in the case of a voluntary dissolution of a corporation." (Id.)

"S. 90 [Sec. 79.] The receivers shall distribute the residue of the moneys in their hands, among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained as follows:

1. All debts entitled to a preference under the laws of the United States.

2. Judgments actually obtained against such corporation to the extent of the value of the real estate on which they shall respectively be liens.

3. All other creditors of such corporation in proportion to their respective demands without giving any preference to debts due on specialities." (Id. p. 771.)

In view of the New York statutes cited, it is said in Willard's Equity Jurisprudence, pp. 751, 752, "With respect to the remedy of a judgment, creditor of a corporation, whose execution has been returned unsatisfied in part or in whole, it has been decided that he can not resort to a creditor's bill and thus acquire a lien upon the effects of the corporation in his own favor in preference to other creditors. But his remedy is under the statute to obtain a sequestration of the stock, property, things in action, and effects of the corporation, and the appointment of a receiver."

The cases cited in support of this dictum amply sustain it.

Lowene *v.* American Fire Ins. Co., 6 Paige, 482.

Morgan *v.* New York and Albany R. R. Co., 10 Paige, 290.

It was urged in the Circuit Court that the demurrer should be sustained to the bill because of the laches of the complainants in the pursuit of the equitable relief now claimed.

As the same question would arise on the final hearing, we will not consider it here in connection with the demurrer, but will present it hereafter, in connection with the evidence, as a mixed question of law and fact.

II. *Upon the facts disclosed by the answer and the evidence, complainants have no subsisting claim against the railroad company, and are precluded by the Lindley judgment.*

It will be remembered that the claim of the complainants against the railroad company that it is proposed to enforce against the assets of the company, arises out of their ownership, and that of those under whom they claim of fifty-three of the 110 real estate bonds of the company. These bonds were dated September 20th, 1854, and secured by mortgage of that date. That in a suit to foreclose this mortgage, brought by Pepin in the Floyd Circuit Court, judgment was rendered, on the 14th day of November, 1857, in favor of Pierson and Seymour, trustees, for the use of the parties whose rights complainants represent, for $54,855 and for foreclosure and sale of the mortgage lands. The bonds were taken as due by reason of default in the payment of interest. The aggregate amount due to all the holders of the bonds, and for which judgment was rendered, was $116,670, beside costs of suit.

After sale of the mortgage lands and distribution of proceeds, there still appeared due, according to the report of sale, balances to all the bondholders, amounting, in the aggregate, to $85,319. (p. 58.) Of this amount the complainants claim, in the proportion, $54,855 to $116,670.

As against this judgment, the answer sets up these matters, viz.: That certain of the bondholders, provided for in this judgment, other than the complainants, held a distinct additional security for the payment of their bonds, in the shape of another mortgage upon other lands. That this other mortgage was then in course of foreclosure. That by arrangement among all the parties concerned, including the railroad company, it was agreed that the parties holding the additional mortgage should throw their security into a common fund with the first mortgage, to be distributed proportionately among all the bondholders and to be received in full satisfaction by them, and that it was done accordingly.

And further, the answer sets up that in a subsequent suit in the same Court upon the same bonds and mortgage, in which one Lindley was plaintiff, and all the other parties in interest, including the complainants, and the railroad company were defendants, it was finally adjudged that, by the arrangement above mentioned, the complainants had received satisfaction and were fully paid.

The facts in regard to these questions, as they appear in the evidence, are substantially as follows:

As to the Pepin foreclosure in 1857, the bill and answer substantially agree, except that the answer tenders a question as to whether that judgment was anything more than one of foreclosure. The answer assumes that it was merely such, and not a judgment *in personam*, and that the order for execution, in aid of which this bill is brought, issued at the succeeding term, when the parties were out of Court, was *coram non judice*. But as the record presents so much matter requiring consideration, we will pass over this question.

The existence of the additional mortgage upon other property, to secure the holders of some of the bonds secured in the first mortgage, as stated in the answer, and the foreclosure of it in the Floyd Circuit Court, were proved by record. That foreclosure suit was entitled similarly to the first, (pp. 177 to 181.) The mortgage was dated October 20, 1857, more than three years after the first mortgage. The suit to foreclose it was commenced January 21, 1858, and resulted in final decree April 30, 1858.

The first mortgage was to trustees for the benefit of all the bondholders. At the time of its foreclosure, Nov. 14, 1857, the following persons were found to be the owners of the bonds, viz.: The assignors of complainants, Victor A. Pepin, Walter Mann, Samuel H. Patterson, Charles B. Applegate, James Montgomery, John S. Davis, Thomas L. Smith, John S. McDonald, William M. Wier and William B. Lent. (p. 49.)

The second mortgage was made to the same parties, excepting complainants' assignors, Walter Mann and Samuel H. Patterson. (p. 178.)

On the 30th of March, 1858, all these parties to both mortgages, being all the holders of the real estate bonds, entered into a written agreement by which the two mortgages were thrown

into a common fund, and Messrs. Pepin and Kerr were made trustees for them all, who as such, were to bid in, at Sheriff's sale, all portions of the property that might not be bid in by strangers, at acceptable prices, and were to sell the lands they might thus buy, and distribute the proceeds. This agreement (3d clause) expressly contemplates the sale to occur under the second mortgage. The last clause of it manifestly contemplates that the arrangement was regarded as in the nature of a composition with creditors. It provides that instead of actually converting the property into money, the trustees, Pepin and Kerr, might, in their discretion, sell any of the property to any of the *cestuis que trust*, not exceeding forty per centum of the bonds originally filed by such purchaser, "*in liquidation of so much of their interest in said judgment and decree, and any judgment to be rendered.*" (pp. 74, 75, 76.)

It is true that the railroad company was not in terms a party to this composition. It had abandoned its enterprise and ceased to maintain its active organization. These mortgagees seem to have deemed it unnecessary to consult it, and to have assumed to administer upon its property according to their own pleasure, resorting to the Court only as it was necessary to obtain a legal title. But the President and a majority of the directors of the railroad company, were parties to the agreement. James Montgomery was President, (p. 107, ques. 1) and he, and Pepin, Davis, Smith, McDonald, Wier and Lent, were directors. (p. 104, ques. 10.)

The property, covered by both the mortgages, was bid in, in substantial conformity with this arrangement, though the details of the execution of the trust vested in Pepin and Kerr, were, in two respects, modified. Heman Ely, the complainant, instead of Pepin and Kerr, became the nominal purchaser of the property embraced in the second mortgage, but subject to the prescribed trust. (p. 95, ques. 23 and 24.) And instead of sale made by the trustees, a voluntary partition was made among the various parties interested, (pp. 94, 95, ques. 20 to 22) pursuant to schedules agreed upon by them. (pp. 118, 119.) These schedules were according to the estimated intrinsic values of the property, and are, in part at least, in the handwriting of complainant, Heman Ely, (p. 107, ques. 4) who was, at the time, representing

all the interests now represented by these complainants. (p. 96, ques 26.)

The understanding and conduct of the parties in carrying out the arrangement, corresponded with the written agreement. It was not understood by them that the judgment was to be credited with the nominal proceeds of the sale under foreclosure of the first mortgage, but that it was to be credited with the real value of all the lands acquired to the common fund from both mortgages. It was their further understanding at the time, that after these mortgage sales, there remained no available means of the company, and that they would get nothing more. (Mr. Montgomery's dep., p 108, ans. to ques. 10.) (T. L. Smith's dep., ques. 34, p. 102 and ques. 8, p. 103.)

As late as May 9th, 1864, when the assignors of complainants filed their first answer in the Lindley case, they say that the railroad company "has no property out of which said balance. or any part thereof, can be made." (p. 132.)

Pursuant to this composition arrangement, the complainant, Heman Ely, at the foreclosure sale under the second mortgage, made on the 27th of October, 1858, became the purchaser of all the property embraced in that mortgage, at the nominal price of one hundred and fifty dollars, and received a deed. (pp. 85, 86.)

This property was at the time regarded by him and the other parties interested as worth $11,465, and was apportioned among them at that valuation. (Thos. L. Smith's dep., ques. 21 and 22, pp. 95 and 118, 119, also, Jas. Montgomery's dep., ques. 4, p. 107, and ques. 9, p. 108.)

The reason why this large amount of property was suffered thus to sell at a nominal price was that all the parties concerned, the officers of the railroad company included, understood that it was to be thrown into the general fund, according to the written contract, and appropriated at its value, to the payment of the demands of the several parties in whose favor the decree had been rendered in the first Pepin foreclosure. (p. 95, ques. 24.)

The complainant, Ely, testifies, in substance, that there never was any agreement by which complainant's judgment was to be credited with anything more than their proportion of the proceeds of the sale under the first Pepin foreclosure. and that so far as the railroad company was concerned, he was the absolute

purchaser of the 11,465 dollars worth of property covered by the second mortgage, at the nominal sum of $150. And that nothing was ever received on complainants' judgment except their proportion of the first sale. (pp. 83 to 85.)

In the face of the written agreement, and of all the other evidence, his testimony must either be accepted as an untrue statement of fact, or an erroneous legal inference.

If he and his associates obtained that large amount of property under the written agreement and mutual verbal understanding, shown, by which all competition at the sale was quieted, for a mere nominal consideration, and even that not paid by him or them, they should certainly be required to account for it.

The decree rendered by the Court below, in this case, charged the complainants only with their proportionate amount of the reported proceeds of the first foreclosure sale, and charged them nothing for the $11,465 worth of property purchased by Ely as their agent, under the circumstances shown, at the second foreclosure sale.

If the decree were equitable in other respects, it is certainly not so in this, and to this extent, at least, should be opened for correction.

Looking at the transaction, without regard to the Lindley judgment, it seems to have been the contemplation of those parties, that they were to get all the railroad company's lands, as well those mortgaged as those not mortgaged, and nothing more. The compromise of the city's subscription had been made on the 28th of September, 1857—near a year before. None of the parties seemed to have the slightest idea that the city was indebted as a subscriber. The mortgage lands were regarded as theirs, and they agreed among themselves as to the mode of appropriating them. The complainants were permitted to participate in a mortgage security to which they had no legal claim whatever. They paid nothing for the privilege of participating in that other fund, and the consideration for it can only be attributed to the idea of a creditor's composition. If a release or acquittance was not executed to the railroad company, it was because that institution was regarded as virtually dead and not entitled even to be consulted in the partition of its remaining property.

Upon this point, however, the Lindley judgment is, we sub-

mit, conclusive. That judgment is in evidence. (pp. 119 to 168.) We need add but little to the statement of it, made in the answer. The suit was commenced in the Floyd Circuit Court on the 19th of February, 1863, before the filing of this bill, and was finally determined in that Court on the 18th day of February, 1868, during the pendency of this cause.

The complaint of Lindley was in behalf of himself as the holder of three of the real estate bonds, and in behalf of all other persons holding similar bonds. The railroad company, the two Elys, and all the assignors of Burke, and the assignors of Heman Ely, representing the complainants' present interest, were made defendants in the first instance, and later in the progress of the cause, Mr. Burke, himself, appeared as assignee. And generally, all the parties to the first Pepin foreclosure, were made defendants.

Some of the defendants set up the former foreclosure, others ignored it as Lindley did, and joined in the prayer of Lindley's complaint for foreclosure, and others, these complainants among them, did both. In the progress of the case, so many conflicting interests and cross equities were set up, that no science in pleading could have preserved simplicity in the record. But the necessary complexity of the pleadings was, unnecessarily, rendered worse confounded by the pleaders. The nature of the case was such that if the issues had been made up in a Chancery Court of the old school they would have been complex. But made up as they were under the Indiana Code, in all the multiplicity of issues and copiousness of special pleading that it authorizes and invites, the complication is perplexing.

In contributing to this result these complainants, with their answers, cross-complaints, answers to cross-complaints, and replications to answers to cross-complaints, were not behind their co-defendants and co-cross-complainants. Until judicial experience, in the course of time, shall have silently built up a new system of pleading upon the radical, if not crude, principles of the code, confusion in records must be inevitable. But if on this account the judgments of the State Courts are liable to be attacked collaterally, the condition of the State jurisprudence is even more unfortunate than has been supposed.

Of the multitude of pleadings filed and issues joined, but few

affect the question we are now considering. We will make brief reference to those deemed material.

The first answer of complainants, or rather their assignors, in the Lindley case, was filed May 9th, 1864. It set up the former foreclosure, averred that they had never received anything upon that foreclosure judgment, except their proportion of the proceeds of *that sale*. This pleading was made a cross complaint against the plaintiff and all co-defendants, and ruled to be answered as such. (pp. 130-132.)

At the October term, 1866, the railroad company answered the complaint, and this and all other cross complaints in two paragraphs, as they are termed by the code; the first special, and the second a general denial. (pp. 162, 163.) The special paragraph was withdrawn, leaving but the general denial in (p. 163.)

Upon these and other issues the cause was submitted to the Court on the 19th of December, 1867, and the trial proceeded for four days, when an adjournment occurred. Afterwards, on the 27th of January, 1868, the argument of counsel was heard, when by consent, the cause was continued. (p. 164.) Afterwards, on the 18th of February, 1868, the parties came, and now, for the first time, an assignment of interest having taken place, these complainants appeared, "and joining in the plaintiff's complaint, herein filed their separate answers herein, averring therein that they are severally the owners and holders of certain of the bonds described in the mortgage mentioned in said complaint, and severally demand judgment for the amount due on their several bonds, and the relief asked for, in said complaint." (p. 165.) These answers appear on pp. 165, 166 of the printed record, but their character is sufficiently described in the above extract from the record of the Court. No answer or reply to these new pleadings was filed, nor any rule for answer or reply taken.

The transcript then proceeds: "And *by consent*, the trial of the issues joined in this action is now submitted to the Court, upon the pleadings and exhibits filed, and the proofs adduced." (p. 166.)

Some parol testimony was introduced on the hearing in the Court below, appertaining to this point of the Lindley record

This relates to the matter of a consent of parties, given in open court, that payment, and any other special defense to the claims of these complainants, might be shown without further special pleading, and that such matter was in fact litigated. The appellees now object to the competency of all such testimony, but they themselves opened the door to it, so far at least as it was in their power to do so, by first introducing it on the hearing. In attempting to show that the question of settlement and payment was not litigated, they show that, in fact, it was. (T. L. Smith's dep., taken and read by compts., ques. 7, p. 73.)

The appellant then followed up this same line of inquiry. In the deposition of Mr. Smith, taken by defendants, the making of the agreement to waive special issues, and the circumstances under which it was made are fully stated (p. 93, ques. 12, p. 101, ques. 28, 29 and 30, and explanatory statement, p. 106.)

John S. Davis, also an attorney in that cause, remembers that there was some agreement under which the trial continued after complainants intervened, though he does not remember just what it was. (p. 114-115, ques 16.)

Geo. V. Howk, another attorney in the cause, testifies, very explicitly, that such agreement was made in open Court upon the filing of those last pleadings by complainants, and that the trial then proceeded in accordance with the agreement. (p. 115, ques. 1.)

Mr. Burke, one of the complainants, and who was the attorney for all of them in that cause, does not deny the making of the agreement, but says, "I wish to say that I was present during the trial of the Lindley case, and that I do not remember the conversation or agreement named by Judges Howk and Smith in their depositions." (p. 117.)

As suggested before, all this evidence is now objected to as incompetent.

We submit that the objection ought hardly to come from the party who first introduced it.

There can be no doubt, upon the testimony, that such agreement was clearly and explicitly made in open court, and that the trial proceeded to the end, distinctly upon faith of it.

After having thus had the benefit of a full trial of their cause, the chances of success having gone against them, it seems hardly right that they should repudiate the agreement, and attack the

judgment collaterally, because of a clerical omission to make formal record of the agreement.

We claim, however, that this evidence does not contradict the record, but, on the contrary, sustains it. It shows an agreement, in open court, by which the question of payment might be investigated. The record shows that that question was, in fact, inquired of, and that no objection was taken or reserved.

Snider *v.* Corey, 2 John., 227, was for trespass to personal property. Plea, former recovery. Replication, that the former suit was for the same and another similar trespass, both being set up in the same count. That on the trial of the former action the Court, on defendant's motion, compelled the plaintiff to elect, whereupon he elected to proceed for the other trespass. It was held—Kent, Ch. J.—that this might be shown by parol, though the record of the first suit would indicate that the judgment covered both trespasses.

We shall, however, show presently that by the settled course of decisions in the State of Indiana, the mere fact of omitting to take a rule for answer, or to take a judgment *pro confesso*, for want of an answer, but going into trial without either is *ipso facto*, a waiver of an answer, and an agreement that the complaint shall be deemed as controverted for the purposes of trial.

This implied waiver of issue is substantially the same thing, in legal effect, as the express verbal agreement made in open Court; so that it is, perhaps, not very important to either party whether that agreement is regarded as in, or out of the case.

The final decree in the Lindley case is as stated in the answer. It finds that by agreement between the parties who had recovered judgment in the Pepin case, and the railroad company, the mortgaged lands of the company were received by the parties to that judgment in full payment, satisfaction and extinguishment of the real estate bonds and mortgage, and of the judgment so rendered thereon. It was, therefore, finally adjudged that Putnam, Ely, Burke, and Ely Exr. (the complainants here), as well as all the other parties to the Lindley suit, who had joined in the prayer of the complaint, should take nothing. (pp. 166, 167 and 168.)

Three reasons were urged in the court below why this Lind-

ley judgment should not be considered against the complainants as *res judicata*.

First, it was objected that it was not between the same parties. It is true that the city of New Albany was not a party to Lindley's suit, but we submit that the city, in the capacity in which this suit assumes to place it, is in privity with the railroad company.

As between a judgment debtor, and any debtor of his whose claim it is proposed to subject to the judgment, a creditor's bill assumes a privity. The relation of debtor and creditor exists, and *through that relation* a creditor's suit operates. In this respect it is similar to the garnishee process. A judgment establishing the creditor's claim is equally conclusive against the debtor's debtor, for the purposes of a creditor's suit, as it is against the debtor himself. A subsequent judgment, ascertaining that the former one had been paid, or a subsequent judgment for any cause reversing or annulling a former judgment, would, of course, be a good answer so far as the principal debtor was concerned, to a creditor's bill brought in aid of that former judgment. Why should it not be a good answer so far as any debtor of the principal debtor is concerned? A decree in a creditor's suit against the debtor of a judgment debtor, subjecting assets, but in favor of the judgment debtor himself, and dismissing the bill because the creditor had no subsisting judgment, would certainly seem an anomalous adjudication.

But here the privity is closer than that of mere debtor and creditor. The city is sued as a *stockholder* indebted upon subscription. In its capacity as stockholder the city would be bound by any judgment against the railroad company. The stockholder *as such* and the corporation are privies in all transactions between the corporation and third persons. Surely the stockholder, pursued as such in a creditor's suit, is entitled to the benefit of a judgment rendered in favor of the corporation upon the very claim he is called upon to pay.

Second. It was objected, that the cause of action in the Lindley suit and in this case, are different. That in the Lindley case the action was upon certain bonds, while in this case the action is upon a judgment.

When it is remembered that those bonds and that judgment represented the same identical debt, and that the Lindley judgment ascertained that those bonds had been fully paid and satisfied, this point would seem rather too acute to please a chancellor.

But this suit is not strictly one upon a judgment. If it were, the action should be at law and in debt. It is rather in aid of execution upon a judgment to recover a balance assumed to remain unpaid. If there remains no such unpaid balance, the complainants have no equity.

In the Lindley case, the former judgment of foreclosure rendered in the same court, and the bonds upon which that judgment had proceeded, were both in consideration before the court, and the court adjudged that certain transactions had by the parties *after the rendition of the foreclosure judgment*, operated a full satisfaction of the entire claim. The Lindley suit and this suit had the same purpose. Both were brought to collect the same debt.

But while we insist that the two actions were in fact for the same cause, we by no means admit that it is essential to the authority of *res judicata*, that this should have been so. We claim that any question material in the former—the Lindley—action, submitted to and determined by the court, became *res judicata*, and concludes the same parties or their privies, whenever it may come in question between them in any subsequent action, whether the two actions in their general scope, are the same or different.

If in the Lindley case the question of the payment of the identical debt now in controversy, was litigated and distinctly passed upon by the court in final judgment, we submit that that question is finally at rest so far as these parties are concerned.

Hopkins *v.* Lee, 6 Whea., 109.

Lee sued Hopkins in covenant on a title bond conditioned for the conveyance of lands, when he should remove an incumbrance on certain other lands that he had sold Hopkins. He averred that he had removed the incumbrance. On the trial he offered the record of a previous chancery suit brought by Hopkins against him, in which Hopkins charged that he had been obliged to pay the incumbrance, and asking that he be adjudged to have a lien on lands mentioned in his title bond. In this chancery suit

it was ascertained that Lee had furnished the money, and that Hopkins was in his debt. *Held* that the record was admissible.

Crondson *v.* Leonard, 4 Cranch., 434.

This was on an action on a policy of insurance on the cargo of the brig "Fame." The defendant relied on a judgment of the vice-admiralty, court of Barbadoes, condemning the vessel for an attempt to violate the blockade of Martinique, to prove that one of the conditions of the policy had been violated. Held that the sentence of the court at Barbadoes was admissible in the suit, and conclusive upon that point.

Ingraham et al., *v.* Dawson et al., 20 How., 486.

The Grand Gulf Banking Company recovered judgment against Hobbs. Afterwards it made an assignment in trust to Ingraham and Read. Afterwards, Marshall sued the bank in the State Court, attaching the Hobbs judgment. The assignees intervened with their claim under the assignment. The court rendered judgment in favor of Marshall, sustaining his attachment and rejecting the claim of the assignees. This action was by the assignees in the Federal Court to enforce their rights as assignees. Held that it was "res judicata." Per Mr. Justice Catron: "Nor could a Court of the United States, in a suit by bill in equity, call in question the informalities, if any exist, that may have occurred in executing the judgment of the State Court. It was the duty of that Court to correct any misconduct or mistake on the part of the Sheriff in conducting the sale under the judgments, had complaint been made in time and proper form."

Parrish *v.* Ferris, 2 Black, 606.

This was ejectment to recover possession of lands. The claim rested upon a will. Plea that the ancestor of plaintiff's lessor had brought a previous action in a State Court of Ohio, against the defendant, to quiet the same title, and that his bill had been dismissed. Held that this was conclusive against the plaintiff in his action of ejectment.

We also refer to Washington & Co. *v.* Sickels. 24 How., 333, on pp. 341 to 343.

Third. It was objected that because the Lindley record failed to show that answers had been filed to the complaints of these complainants, setting up their bonds and asking judgment upon

them,—because no plea of payment, or of accord and satisfaction was put in, therefore the final judgment of the Court specifically ascertaining that the debt had been fully paid and satisfied, and dismissing their complaints, was outside the issues, and therefore concludes nothing.

We are now leaving out of view the fact that, by agreement in open court, they waived answers and agreed that all special defences, including payment, might be shown without further pleadings.

Their proposition, then, amounts to this; That after voluntarily going into trial without answers, and without taking any rule for answer, and without taking any default for want of answer, and without reserving any exception whatever to the mode of proceeding, and without praying any appeal for the correction of supposed errors, they may treat the judgment of the Court, dismissing their complaints, as void and concluding nothing.

It is not a question here whether or not error intervened in the Lindley record. That is a question exclusively for the Supreme Court of the State.

Nor is it a question here whether or not the judgment in that cause was warranted by the evidence. The evidence offered to the Floyd Circuit Court is not in the record, and if it were, this Court would not consider it.

That question also appertains exclusively to the Supreme Court of the State. (Randall *vs.* Howard, 2 Black, 589; Grant *vs.* Button, 14 John. 377.)

If the record of that cause showed affirmatively that no evidence of payment and satisfaction whatever was offered, but that the Court found the fact upon some utterly false rule of presumption, still it is a question exclusively for the State Court for the correction of errors.

But the judgment in that cause shows on its face that that question was inquired of, and if the Court had jurisdiction of the question, the undisputable presumption in any other court before which the record comes, collaterally, is that the judgment ascertains the truth.

If the question was submitted to the court there was jurisdiction. If the mode of submission was irregular, the irregu-

larity might be corrected in a court of errors, or on review, at the instance of the party aggrieved. But the jurisdiction is not dependent upon the form, but upon the fact, only, of submission.

Was the question of payment or satisfaction of the same debt now in controversy submitted to the Floyd Circuit Cour in the Lindley case?

This fact constituted an essential part of the cause of action there submitted to the Court. It was the breach. Even the code requires an averment that the debt remains unpaid. (2 G. & H., 373.)

The complaints filed by these complainants avered that their bonds remained unpaid.

They themselves then submitted this question as fully as they submitted any other, to the court. It was an essential element of the controversy.

Undoubtedly the burden of proving payment rested upon the defendants to these complaints.

Undoubtedly, in the absence of any agreement or waiver, a plea of payment should have been put in to authorize the introduction of proof of the fact. But are these conditions of jurisdiction? Certainly they are matters of pleading and practice only. Jurisdiction, as defined by this court in Crignon's lessee *vs.* Astor, 2 How., on p. 338, is a juridical attribute paramount to mere forms of proceeding.

Suppose a court should hold that the burden of proving nonpayment rested upon the party alleging it. It would be a gross error, certainly. But will any person contend that a judgment rendered upon that erroneous view of the law would for that reason be a nullity?

Suppose a court should hold that, under the Indiana Code, proof of payment was regularly admissible without a special plea of payment; this, if the question were properly reserved, would no doubt be an error for which the judgment might be reversed. But certainly such an error would not forfeit jurisdiction.

In the absence of the parol agreement under which the case was tried, the worst vice that can be attributed to the Lindley judgment would be that the court erred in opinion as to where the burden of proof rested.

In inquiring as to the faith, credit and effect due to this Lindley judgment, the decisions of the Supreme Court of the State in which it was rendered are appropriate sources of information. According to these there is not even error in the judgment.

The cases holding that an error not objected to in the *nisi prius* court, shall be deemed waived, are so numerous that a list of them would be tedious. In the cause in question, the complainants had the right to have their complaints either answered or adjudged confessed. They did neither. This of itself, operated a waiver of answer, and an agreement that their complaints should be deemed controverted and tried without answer.

When evidence tending to show payment and satisfaction of their claims was offered, they had the right to object if they supposed such evidence inadmissible, and to reserve an exception. But they did nothing of the kind. This of itself amounted to a waiver of the objection.

We refer to one case especially, because it cites many others. Preston *v.* Sandford's Adm'r, 21 Ind., 156. In that case the defendant pleaded affirmative pleas, to which there was no replication. Failing to establish his pleas, he appealed, and assigned the want of issues as error, in the Supreme Court.

The Court say: * * * "When the defendant had put in his affirmative answers, containing matter of avoidance, he was entitled to his rule for a reply; and on failure of the plaintiff to comply with it, he might have craved judgment against him, taking his answers as admitted to be true. He was not bound to go to trial till issue was formed, but he consented to; he waived the reply, the preliminary step to a trial, and consented to treat the answers as untrue, though not denied, and to go to the proof of them as though denied. A trial was had accordingly, and resulted adversely to the defendant. All this appears of record. Hence upon the record, as it stands, the defendant is not entitled to judgment. Such is the settled practice under the code, on appeals to the Supreme Court. * * * It would be impolitic to allow a party to consent to go to trial upon a given state of the record, take his chance of success upon it, and failing, to then turn round, repu-

diate his own voluntary act, and thus defeat his opponent under all circumstances."

In Smith *v.* Smith, 23 Ind., 202, the Court say: "This Court has so often decided that it will not reverse a case on questions not raised in the Court below, that we think we ought to regard that point as settled, and we do not therefore examine it. The cases to this effect are very numerous, and a few of them may be found cited in Preston *v.* Sandford, 21 Ind., 156."

In actions at common law, verdicts and judgments are usually general. It is therefore necessary to look back to the pleadings to see what facts were in issue. To show that any other facts had passed into judgment, would be to contradict the record, and would therefore be inadmissible. The record is conclusive, that these facts, or a sufficient portion of them to sustain the verdict, and these only, were found. Hence, as applicable to all such cases, it is very correctly said that the record concludes nothing that was not put in issue.

But in chancery causes, where the decree itself, except when merely in dismissal of the bill, usually shows the facts on which it proceeds, this rule is less applicable. In the particular record under consideration, the complaint alleged non-payment, and submitted that, among other matters, for trial. Answers being waived, the issues were left at large, to be developed *ore tenus*, and in the evidence.

The final decree shows specifically what matters were inquired of, and what facts were established. To argue that this result is a nullity, because the facts found are not comprehended in any technical issue, when further pleadings had been waived, is not in accordance with the principles upon which the doctrine of "*res adjudicata*" rests. Such an argument seems to us to confound questions of pleading and practice with questions of jurisdiction. The matters of controversy submitted to the arbitrament of the Court, define the scope of jurisdiction in any particular controversy. The rules of pleading, evidence and practice, are but the conventional system according to which that jurisdiction is exercised.

The leading maxims of the common law and of the civil law, relating to the authority of *res judicata*, are substantially the same. Ours seem borrowed.

In Pothier's Law of Obligations, Vol. I, p. 488, it is said: "A judgment is null, when it pronounces upon what is not demanded, or condemns a party to the payment of more than is demanded of him; for the judge is only to decide upon the demands which are brought before him, and, therefore, can only give judgment in respect of such demands. * * * * These nullities, which arise from the judge having decided upon what was not submitted to him, do not operate *pleno jure;* they ought to be taken advantage of either by the ordinary course of appeal, when the judgment is not in the last resort, or by *civile requete* when it is; and when the party has allowed the time for these to elapse, without impeaching the judgment, the nullities are cured."

"The authority of *res judicata* induces a presumption that everything contained in the judgment is true, and this presumption being *juris et de jure*, excludes every proof to the contrary." Id., p. 492.

Many cases were cited in the Court below as tending to sustain the proposition that a finding and judgment outside the issues conclude nothing. We could hardly hope to have the indulgence of the Court were we to attempt a particular examination of all these.

Should they be cited here, it will be observed that some of them relate to verdicts and judgments that were general, and where the scope of the verdict could only be known by consulting the pleadings, and it was held that nothing outside these could be regarded as *res judicata*, as in Crandall *v* Gallup, 12th Conn., 365.

Others merely decide that it is only the precise fact found, and not any other fact to be derived by inference from it, that is to be regarded conclusively settled. Campbell *v.* Consalus, 25th New York, 613, and Haight *v.* Keokuk, 4 Iowa, 199, are cases of this class.

Others hold that in actions for torts, nothing is conclusively settled but the point or points put directly in issue, as in Standish *v.* Parker, 2 Pick., 20. The doctrine of this case, by the way, has been rejected in this Court; Miles *v.* Caldwell, 2 Wall., 36.

Others, especially Massachusetts decisions, take a distinction between cases where the former record is pleaded as an estoppel

and cases where it is relied on in evidence. For the former purpose they hold that there must be an averment of fact precisely stated on one side and traversed by the other, and found by the jury affirmatively or negatively, in direct terms, and not by way of mere inference. But that where the record is used for the latter purpose—as evidence—such precise issue is not requisite, but proof *aliunde* may be made that a particular question was actually contested and submitted. Sawyer *v.* Woodbury, 7 Gray, 497, is one of this class of cases.

If there exists any decision to the effect that a final judgment of a Court of competent jurisdiction over both subject matter and parties, upon a material question submitted to its arbitrament in the complaint or other pleading of the party against whom the decision was rendered, whether issue was technically joined of record upon it or not, and whether the trial was in strict accordance with the rules of judicial proceedings or not, is void, we have never met with it.

In Dutton *v.* Woodman, 9 Pick., on p. 261, the court say: "We consider the rule well settled, in this commonwealth, that to render a former judgment between the same parties admissible in evidence, in another action pending between them, it must appear that the fact sought to be proved by the record was actually passed upon by the jury in finding their verdict in the former suit. It is not necessary that it should have been directly and specifically put in issue by the pleadings, but it is sufficient if it is shown that the question which was tried in the former action between the same parties is again to be tried and settled in the suit in which the former judgment is offered in evidence."

In Putnam *v.* Cooper, 15 Pick., on p. 285, the court quote with approbation from 1 Stark. Ev. (4 Am. Ed.), 200, this passage: "It is not necessary that the fact to be proved by the record should have been solely and specifically put in issue on the former trial; it is sufficient if it was a fact essential to the finding of the verdict."

In that case it was held that the "judge's report," which was not part of the record, was admissible to show what facts were controverted.

It also holds that where an action depends on a question which was tried in a former action between the same parties,

but which does not appear by the record to have been put in issue, parol evidence is admissible to prove that the same question was submitted to and passed upon by the jury, in the former action.

The case of Washington, &c., Co. *v.* Sickles, 24 How., 333, is an important guiding case in this branch of the law. It is there said (p. 341): "The essential conditions under which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of demand and of the parties in the character in which they are litigants." Nothing in this case suggests that technical accuracy in the observance of the rules of special pleading and evidence forms one of those conditions.

In Miles *v.* Caldwell, 2 Wall., 357, the court say: "We are of opinion that the prevailing doctrine of the courts, at present' is, that whenever the form of the issue in the trial relied on as an estoppel is so vague that it does not determine what questions of fact were submitted to the jury under it, it is competent to prove, by parol testimony, what question or questions of fact were before the jury, and were necessarily passed on by them."

In the case in consideration, the decree itself indicates what questions of fact were submitted, and shows expressly what were found.

It may very properly be suggested, that when it is said in elementary books and in decisions, that it is essential to the authority of *res judicata*, that the fact in question must have been "put in issue," that term is not used in the technical sense it bears in special pleading, but rather that it is used in the more general sense of being brought into controversy and litigated.

An instance of this occurs in the case last cited, where this Court say: "No reason is perceived why parol proof should be admitted to show what facts were proved or were put in issue, under the general issue in assumpsit, that would not be applicable to the same issue in trespass. Yet it is quite clear, from numerous authorities, that the facts put in issue in assumpsit, may be shown in another action by parol.

McLean *v.* Hugarin, 13 John., 184, was an action of trover for a spinning wheel. The defense was that in a former action by the defendant against the plaintiff, before a justice of the peace, the plaintiff had set up the same claim as a set-off. Held, that

though not properly admissible, yet if admitted without objection and passed upon, it was a bar.

Wilder *v.* Case, 16 Wend., 583, is a case similar in effect.

In Horner *v.* Doe, 1 Ind., 130, the Supreme Court of Indiana hold, "that the judgment of a court of any of the States of this Union, having jurisdiction of the subject-matter of the suit and of the person, however irregular, is not void and not impeachable collaterally, unless it may be for fraud. That where the record shows nothing upon the point, jurisdiction of the person and of the subject-matter will, the contrary not being proved, be presumed, in cases of domestic judgments of courts of general jurisdiction, where they come collaterally in question." Same point, Evans *v.* Ashley, 22 Ind., on p. 17.

We submit, then, that even in an action of law if the record clearly manifests that any particular question, especially one that is strictly within the scope of the case made by the declaration, and essential to it, has passed into judgment, no other court before which it comes, collaterally, can properly disregard the judgment or inquire whether the issues upon it were or were not properly made.

But this is especially true in regard to final decrees in chancery, where numerous parties and divers and complicated interests were before the court. In such cases the chancellor must often establish a scheme of equitable justice, different from that contemplated by any of the pleadings. In Babcock *vs.* Camp, 12 Ohio State, on p. 37, the Supreme Court of Ohio, in considering the effect of a decree in chancery that came under consideration, collaterally, speaking of the same point, say: "It was the policy of proceedings strictly in the course of the common law, to narrow the issues to a few distinct points of contest; and hence there was as to them reason in the rule contended for by the plaintiff's counsel; but it seems to us that, as to a proceeding in chancery, involving numerous items and complicated matters of account between many and differently related parties, and where many of the claims of the parties respectively must be made and contested orally before the master, and on argument of exceptions to his conclusions, the reason of the rule fails, and the rule itself can have no proper application."

It is but rarely that a case is met with to which this observation of the Ohio court is more applicable, than to the Lindley case.

The plaintiff and these complainants, and other parties, prayed judgment on those bonds and foreclosure of the mortgage.

Others set up a former foreclosure and sale, in bar. The owners of all the one hundred and ten bonds were before the court.

Whatever their several theories might be, it was obvious that the same rule and measure of justice were applicable to them all, and that all should be subjected to one common principle of adjustment, irrespective of their diverse theories of right.

The finding of the court was that all those bonds had been paid and satisfied out of the lands of the railroad company.

This at once disposed of the demands of all the bond holders except that of the plaintiff, Lindley. He had not been personally a party to the prior foreclosure, and by some carelessness or fraud the bonds he held had been represented by another party.

Obviously he was entitled to some relief. The relief he demanded in his complaint, and to which he would have been entitled under the code if wholly unaffected by the prior decree, was judgment *in personam* against the railroad company for the amount of his three bonds, and for foreclosure of the mortgage. But, even as to him, the court applied the same rule as to the other parties.

He was not unaffected by the prior decree, for his interests had been represented in the persons of the trustees, Pierson and Seymour.

The State Code provides that "* * * a trustee of an express trust * * * * may sue without joining with him the person for whose benefit the action is prosecuted." (2 G. & H., p. 37.)

Lindley was therefore affected by the prior decree, but Pepin, who had received the distributive share of the property applicable to Lindley's three bonds, was decreed to have taken as trustee only, and his grantees having taken with notice, were held affected with the trust, and it was adjudged that this portion of the property should be subjected to Lindley's claim. No

judgment ever against the railroad company was rendered in favor of Lindley. This *pro rata* share of the property was all that was adjuged to him.

Whether the fundamental idea upon which this decree proceeded was correct or incorrect, is a question that need not be discussed here. That idea, however, pervaded and governed the decree in all its plan and details. It affected the rights of all the parties to that proceeding in the same manner and degree, and was consistent throughout. The part that it is now proposed to reject as *res non judicata* is the essential governing idea upon which the whole decree turned. If erroneous, it injured all alike, but no one concerned so much as took an exception. It stands unreversed and unappealed from as the final adjustment of an important and complicated controversy.

III. *Upon the facts disclosed in the answer and established by the evidence, the City of New Albany, appellant, is not indebted to the railroad company.*

We propose to add nothing here to what has been already said, in connection with the demurrer, as to the nullity of the subscription as originally made; the inadmissibilty, under the issues, of evidence tending to prove ratification; or of the insufficiency of the attempted ratification, as shown by the evidence extraneous to the issues, appearing in this record.

Our purpose is to show that the subscription conceding for argument, that it was valid, and all liability arising out of it, were cancelled and determined by valid compromise made by competent authority, in good faith and on a good and adequate consideration.

The condition of things that induced the compromise ~~are~~ stated clearly in the deposition of Thos. L. Smith, who was director and secretary of the railroad company at the time, and closely identified with its affairs. (ques. 3 and 4, pp. 90, 91.) The railroad company had largely relied on the subscription of the city for the cash means to carry on its enterprise. The subscription was payable, not in money, but in long bonds, and the necessary cash means could be obtained only by sale of the bonds. Negotiable bonds, to the amount of $200,000, had already been executed by the city to the company. Seven only of these had been sold, but active efforts were being made to ne-

gotiate the remainder in the city of New York. In the meantime, suits were commenced in the Floyd Circuit Court to enjoin the collection of the bond tax, upon the ground that the subscription was invalid. One of these suits, that of John Briggs, was commenced June 10th, 1856, (p. 168) and resulted in a perpetual injunction, Nov. 10th, 1857. (p. 172.) The other suit—that of Peter Tellon—was also commenced June 10th, 1856, (p. 173) resulting in an injunction Nov. 10, 1857. (p. 176.)

Before sales of the bonds could be effected in New York, information of the pendency of these suits had been received there, and the effect was to cast such doubt upon their validity, that it was impossible to sell them there or elsewhere, at any price, or at least without so ruinous a sacrifice that a sale could not be thought of.

Failing to effect sales of the bonds, the railroad company borrowed money, to meet pressing exigencies, from the Ohio Insurance Company, of New Albany, pledging all the city bonds as collateral security. The amount of this loan is stated by Mr. Montgomery, President of the railroad company, as ranging from $35,000 to $45,000. (p. 110, ques. 26.) Mr. Davis, a director, and the acting President of the insurance company, states the amount as about $35,000. (p. 113, ques. 2.) The city ordinance, to compromise, states the amount at $36,000, which is probably the true amount. (p. 88, Sec. 4.)

This borrowed money fell due. The insurance company was demanding payment and threatening to sell the collaterals. (p. 91, p. 111, ques. 31, p. 113, ques. 5.) The suits to enjoin the levying of a bond-tax, were still pending, and it was evident that a determination of them could not be reached without protracted litigation. The determination that was afterwards reached, November 10th, 1857, was obtained only through the compromise.

The railroad company had no available means of payment, and it was obvious that unless some new arrangement could be made, the entire issue of city bonds would be sacrificed without accomplishing any substantial relief to the company or its creditors. (p. 91, p. 111, ques. 33 and 34.)

Under these circumstances the Directors of the railroad company determined to make a representation of the condition

of the company to the City Council, with a view to the compromise afterwards agreed upon. On the 7th of August, 1857, the Common Council passed an ordinance, authorizing and directing the Mayor to make the compromise. The terms were that the railroad company should cancel the subscription, and surrender all the bonds and coupons issued except the seven bonds that had been sold, and should consent to the repeal of all ordinances of the Council, except that one relating to the subscription. In consideration of which, the city should assume and pay the $36,000 of borrowed money to the insurance company, and also pay the costs in the suits pending to enjoin the bond tax, and also all attorneys' fees in those cases. (pp. 87 to 89.)

On the 8th of September, 1857, the board of directors of the railroad company, by resolution, accepted the terms of compromise expressed in the ordinance, and authorized the President of the company to carry the arrangement into execution. (p. 87.)

The bonds at the time of this compromise had no market value. The whole $193,000 of them outstanding in the hands of the railroad company or its piedgees would not, probably, have sold for enough to satisfy the $36,000 for which they were pledged, and could not have been more advantageously disposed of. (Mr. Smith's dep., p. 91, ques. 4. Mr. Montgomery's dep., pp. 91, 92, ques. 27 to 39. Mr. Davis' dep., p. 114, ques. 6, 13, 14.)

There is no conflict in the testimony upon this point.

In the making of this compromise there was no thought of hindering, delaying or defrauding any creditor of the railroad company. "It was then supposed by all the parties that the adjustment would enable the railroad company to pay off all its liabilities, and that the city was the greater loser." (p. 94, ques. 13, 14. p. 112, ques. 40, 41.)

All the evidence indicates that all other debts have been paid, and there is no evidence tending to show that a dollar of indebtedness remains unpaid, unless it may be for a balance on the 110 real estate bonds.

Those real estate bonds, amounting in all to $110,000, were secured by mortgage on real estate that in September, 1854, had been valued by sworn appraisers at $154,855. (p. 42.) The ap-

praisers were respectable men. One was the Recorder and another was Auditor of the county. (p. 94, ques. 15.)

It is true that in the year in which the compromise was made—1857—the values of the lands depreciated on account of the failure of the railroad enterprise, and also on account of the general financial embarrassment that occurred that year. (p. 94, ques. 16.)

But no one concerned seems to have doubted but that this, with the other real estate owned by the company, a part or all of which, valued according to the low prices of the next year at between $11,000 and $12,000, was embraced in the second mortgage above spoken of, would be sufficient to satisfy the real estate bond debt.

All these lands, as mentioned already, were in effect appropriated and partitioned among the bond holders, according to their own pleasure, in advance of any judicial sale, under a contract among themselves that practically cut off all competition, and that rendered the judicial sale but a mere form of vesting title in themselves. Had it been otherwise, and had that composition arrangement among the real estate bond holders not been made, it is impossible, at this distance of time, to say that those lands would not have fully paid those bonds.

This adjustment was evidently made in entire good faith. It is apparent, also, from the evidence, that the arrangement was a beneficial one for the railroad company, and, therefore, for its creditors also, and onerous upon the city. The city did not owe money, but bonds. It had delivered all of the bonds that had been called for by the railroad company, and all except $50,000 that, under the terms of the assumed ratification, could be called for until the performance of a condition that never was performed. The bonds issued would not fall due until 1874. The city, equally with strangers, had the right to purchase them, and in this adjustment exercised that right, paying more than any person else would have paid for them. It paid $36,000 to the insurance company, $7,000 on the seven bonds outstanding in the hands of third persons, and the costs of the Briggs case and the Tellon case. In each of those cases, the judgment shows an allowance of $1,000 as commissioners' fees. The amount of other costs, and of attorneys' fees, does not appear. The city, therefore, paid at least $45,000. The value of the

bonds at that time was not more than 15 to 20 cents on the dollar, if they had any market value. (p. 114, ques. 6.) If, therefore, all the remainder of the $250,000 had been then issued, so that the railroad company would have held $243,000 instead of $193,000, the city, in the compromise, paid nearly, if not fully, enough to purchase the whole of them at the highest market price suggested by any of the evidence.

It is, of course, not a question here how much the city would owe on these bonds, when pay-day should come, but how much they were worth in the hands of the railroad company at the time, it being under the necessity of selling them then. If under the arrangement made, the railroad realized full as much as it could have realized in any other manner, and, according to all probability, much more, no creditor can reasonably complain.

Such, then, were the facts as to this compromise with the city. If it is invalid, it is not because it was actually fraudulent, or because it was unequitable against the railroad company, or because it injured or impaired the rights of any creditor, for, in all respects, it was the reverse of this.

If it is to be set aside, it must be because of some arbitrary rule of law that permits no inquiry as to facts and circumstances attending it.

Two objections are taken to the compromise. One, that the subscription having been made on petition of citizens, the Common Council had no power to annul or compromise it: the other, that the cancellation or compromise of the subscription was *per se* a fraud upon creditors of the railroad company.

These, though urged indiscriminately as one objection, are essentially distinct, and we must beg leave so to treat them.

As to this first objection—want of power—the case of Bell *v.* Railroad Company, 4 Wall. 598, is relied on. The Legislature of Mississippi had authorized the police courts of the counties of that State, benefited by the Mobile and Ohio Railroad, to subscribe to its capital stock in any case where the people of the county should vote for it. Pontotoc county voted a subscription, levied a tax to pay it, and ordered the Sheriff, as *ex officio* collector, to collect the tax. The Sheriff did collect a portion of it. The formal act of subscription, however, had not been

done by the police court, and litigation arose between the county and the railroad company respecting the validity of the subscription. The litigation was compromised upon the terms that the subscription should be released, and the money already collected paid over to the company. Bell, the Sheriff, on presentation of a proper order, refused to pay over the money in his hands because the subscription had not been legally made. The suit was by the railroad company against him to recover the money.

The Court held the compromise invalid, because the police board had no power to alter or modify a stock subscription voted by the people.

But while a right to recover upon this ground was not recognized, the judgment that had gone against the Sheriff was affirmed, on the ground that the people having duly voted the subscription; the police board having levied the tax; the Sheriff having collected a portion of the tax and having been duly ordered to pay it over, his liability was fixed, and he could not be allowed to interpose collateral matters by way of defense; that *his* simple duty was to obey the order of the board respecting the disposition of the money in his hands.

The report of this case does not state the functions or powers of the board of police. That was not essential, as a clear ground of recovery existed independently of that question.

But we submit that no such want of power can be predicated of a city organized under the laws of Indiana, and that an inference of want of power in an Indiana city, from the absence of it in a county board of police of Mississippi, is not a *sequitur*.

"The constitution of the State (Indiana) authorizes the Legislature to create corporations, (municipal,) and imposes no limits as to the power to be conferred on them." (The City of Aurora *v.* West, 9th Ind., 85.) The Legislature has conferred upon the Common Council of these cities this, among many other high and important powers, "They shall have control of the finances of the city, and of all property, real and personal, belonging thereto." (1 G. & H., p. 222, sec. 35.)

"A municipal corporation is, for the purposes of its creation, a government possessing, to a limited extent, sovereign powers, which, in their nature, are either legislative or judicial, and may be denominated governmental or public. The extent to which

it may be proper to exercise such powers, as well as the mode of their exercise, by the corporation, within the limits prescribed by the law creating them, are, of necessity, entrusted to the judgment, discretion and will of the properly constituted authorities to whom they are delegated." (Brinkmeyer *v.* City of Evansville, 29th Ind., 191.)

It would seem, from the case of Bell *v.* Railroad Company, that the vote of the people constituted the substantial act in the subscription, and that the police board had no discretion in the matter. The 56th Section of the "Act for the incorporation of cities," above cited, does not make it obligatory upon the Common Council of cities to borrow money or incur debt whenever three-fourths of the citizens petition. Such petition is but a condition of power. After being thus empowered, it is still within the legislative discretion of the Council whether to do the act or not. Assuming the subscription to have been ratified under the subsequent act, the whole matter passed into the control of the Common Council as a matter appertaining to the finances and property of the city. In this regard, the Council had all the power that the Legislature could confer, and all the rights and powers, to deal with the subscription, that a natural person could have.

As to the second objection, viz.: that the compromise of the subscription was fraudulent in law, as against creditors of the railroad company:

In a qualified sense, every debtor may be said to be a trustee of his property for his creditors. As against them, he can not make a fraudulent or even a voluntary conveyance of it. This is more especially the case when the debtor is a corporation. All its claims to credit arise out of its capital and its franchises. In every transaction in which it obtains credit, its capital is impliedly pledged. It is a legal duty of its directors or managers to apply its means to the payment of its creditors first, and for the benefit of its stockholders afterwards, and, as in the case of all other corporate duties, an implied assumpsit to perform it, arises, Hence, when a trading corporation becomes insolvent, it must administer all its property and assets for the benefit of its creditors, and, in effect, it becomes a trustee of its property for them. Its stock notes or subscription roll, being a part of its capital stock, becomes a fund for the benefit of creditors. To

surrender this to the stockholders without good consideration, is a violation of corporate duty and a fraud. This principle of legal justice has been recognized in its fullest extent by this Court.

Mumma *v.* Patomac Co., 8 Pet. 281.

Curran *v.* Arkansas, 15 How., 304.

Ogilvie *v.* Knox Insc. Co., 22 How., 380.

Railroad Co. *v.* Howard, 7 Wall., 392.

The appellees assume that the composition between the railroad company and the city comes within the prohibition of this rule. We contend that it does not.

It is certainly true that the corporation, while it continues to exist as such, and its stockholder, in respect of his unpaid subscription, occupy the ordinary positions of debtor and creditor, and are legally competent to treat with each other as such. It will not be claimed that a general council of creditors must be called to sit in judgment upon each proposition for settlement. The corporation is fully competent to make any settlement that, in its judgment, may seem expedient, and that does not contravene any rule of legal justice, as fully as a natural person might do.

The law imposing on it the duty of applying its assets faithfully in the payment of debts as a corporate obligation, does not interfere with its power to make all dispositions of its property and all compromises and settlements that may, in the exercise of a sound and honest discretion, seem beneficial to creditors and others.

The English statute (13 Eliz. c. 5) prohibits, as against creditors, all voluntary or fraudulent conveyances of property, either personal or real. A corporation, in the absence of any charter restriction, has the right to make any disposition of its property or settlement of its debts, that is not prohibited by the spirit of this statute.

If, for example, a stock subscriber is insolvent, so that dollar for dollar could not be collected, there is no reason why an insolvent corporation should not have the power to realize, through *bona fide* compromise, the most that may be practicable. So of any debt of doubtful or controverted legal validity. If the stock subscription is payable in property or labor, it may cer-

tainly be commuted for such a sum in money, as it would reasonably realize to creditors.

Here the subscription was payable, not in money, but in negotiable bonds that had twenty years to run. Pending litigation, over which the company had no control, and that obviously would be long protracted, had discredited the bonds and deprived them of market value. Yet the exigencies of the situation required that they should be sold, and that immediately.

If by an arrangement with the city the necessity for a sale that would obviously be disastrous, could be averted, and at the same time a larger sum of money be realized for the benefit of creditors, than would be practicable in any other way, it was the manifest duty of the corporation to enter into it.

To argue that an arrangement, made in entire good faith, and so beneficial to creditors, is a constructive fraud upon creditors, would be a violence to common reason that no adjudicated case known to us, calls for.

The case of Mumma *v.* Potomac Co., (8 Pet.) and of Curran *v.* Arkansas, (15 How.) above cited, assume that if the property of an insolvent corporation has passed into the hands of a *bona fide* purchaser or creditor, the contract under which [illegible] acquired it can not be disturbed. In the case of Ogilvie *v.* I[illegible] (22 How.) above cited, rights of no third party h[illegible] The sole inquiry was as to whether or not the de[illegible] or had been creditors of the corporation.

In the case of Mann *v.* Cook, 20th Conn., 177, [illegible] had subscribed for forty shares of the capital st[illegible] ration, and had paid several installments upon t[illegible] as called for. After the corporation had becor[illegible] arrangement was made between him and the pr[illegible] all the previous installments, paid generally on [illegible] were applied exclusively upon twenty of them [illegible] then paid up the balance due on those twenty [illegible] certificate for them, and the president, on bel[illegible] ration, released his subscription as to the other twenty shares. In that case the defendant rendered no consideration whatever for the release, and the company derived no benefit whatever from it. The defendant simply performed in part what he was bound to perform in whole. The naked result was that he rescued one-half of his investment from loss, at the expense of

surrender this to the stockholders without good consideration, is a violation of corporate duty and a fraud. This principle of legal justice has been recognized in its fullest extent by this Court.

Mumma *v.* Patomac Co., 8 Pet. 281.

Curran *v.* Arkansas, 15 How., 304.

Ogilvie *v.* Knox Insc. Co., 22 How., 380.

Railroad Co. *v.* Howard, 7 Wall., 392.

The appellees assume that the composition between the railroad company and the city comes within the prohibition of this rule. We contend that it does not.

It is certainly true that the corporation, while it continues to exist as such, and its stockholder, in respect of his unpaid subscription, occupy the ordinary positions of debtor and creditor, and are legally competent to treat with each other as such. It will not be claimed that a general council of creditors must be called to sit in judgment upon each proposition for settlement. The corporation is fully competent to make any settlement that, in its judgment, may seem expedient, and that does not contravene any rule of legal justice, as fully as a natural person might do.

The law imposing on it the duty of applying its assets faithfully in the payment of debts as a corporate obligation, does not interfere with its power to make all dispositions of its property and all compromises and settlements that may, in the exercise of a sound and honest discretion, seem beneficial to creditors and others.

The English statute (13 Eliz. c. 5) prohibits, as against creditors, all voluntary or fraudulent conveyances of property, either personal or real. A corporation, in the absence of any charter restriction, has the right to make any disposition of its property or settlement of its debts, that is not prohibited by the spirit of this statute.

If, for example, a stock subscriber is insolvent, so that dollar for dollar could not be collected, there is no reason why an insolvent corporation should not have the power to realize, through *bona fide* compromise, the most that may be practicable. So of any debt of doubtful or controverted legal validity. If the stock subscription is payable in property or labor, it may cer-

tainly be commuted for such a sum in money, as it would reasonably realize to creditors.

Here the subscription was payable, not in money, but in negotiable bonds that had twenty years to run. Pending litigation, over which the company had no control, and that obviously would be long protracted, had discredited the bonds and deprived them of market value. Yet the exigencies of the situation required that they should be sold, and that immediately.

If by an arrangement with the city the necessity for a sale that would obviously be disastrous, could be averted, and at the same time a larger sum of money be realized for the benefit of creditors, than would be practicable in any other way, it was the manifest duty of the corporation to enter into it.

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In the case of Mann *v.* Cook, 20th Conn., 177, the defendant had subscribed for forty shares of the capital stock of a corporation, and had paid several installments upon the subscription, as called for. After the corporation had become insolvent, an arrangement was made between him and the president, by which all the previous installments, paid generally on the forty shares, were applied exclusively upon twenty of them. The defendant then paid up the balance due on those twenty shares and took a certificate for them, and the president, on behalf of the corporation, released his subscription as to the other twenty shares. In that case the defendant rendered no consideration whatever for the release, and the company derived no benefit whatever from it. The defendant simply performed in part what he was bound to perform in whole. The naked result was that he rescued one-half of his investment from loss, at the expense of

creditors. The Court held that the necessary consequence of the arrangement would be a fraud upon creditors and other stockholders, and that the release could not be sustained.

In Adler *v.* Milwaukee etc. Co., 13 Wis., 57, there had been no attempted settlement in release of the stock subscriptions. The simple question was whether they were liable to be subjected in equity to the payment of a judgment creditor's claim.

These cases, and very many others, treat the capital stock of a corporation as being in the nature of a trust fund, impliedly pledged to creditors. We refer to these only for the reason that they have been especially relied upon by the other side. But neither of these cases, nor any other that we have met with, holds that a bona fide compromise that is really beneficial to the fund and to creditors, is beyond the power of the corporation, or is to be arbitrarily held fraudulent and void.

This compromise was consummated on the 8th of September, 1857. This suit was commenced on the 29th of January, 1868. After this unreasonable and wholly unexplained delay, these complainants should not, we submit, be heard to question the transaction.

IV. *Upon the showing of bill, answer, exhibits and evidence, the complainants have slept so long upon the rights they assert, that their laches alone would bar any claim to equitable relief.*

This suit was commenced on the 29th day of January, 1868, (p. 1) and no reason is given why it was so long deferred.

The compromise between the city and the railroad company was consummated on the 8th day of September, 1857. (pp. 87 to 89.)

This was more than ten years before the filing of the bill.

The decree of foreclosure, under which complainants claim to be judgment creditors, was rendered November 14th, 1857. (p. 49.) The execution for the balance remaining unsatisfied after sale of the mortgage premises, was issued August 6th, 1858, and returned "*nulla bona*" December 1st, 1858. (p. 67.)

This return was more than nine years before the filing of the bill.

On the 10th day of November, 1857, upon the ground that the subscription was invalid, the city and the railroad company were perpetually enjoined, by the judgment of the Floyd Circuit

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Court, from taking any steps to enforce the collection of taxes against the property of the plaintiffs in two suits that had been brought on account of this railroad subscription. (p. 172 and p. 176.)

This was at a time when the State Court was exercising exclusive jurisdiction of the controversy, and more than ten years before the filing of this bill.

The bill itself states that in 1857 the railroad company became insolvent and abandoned its enterprise. (p. 4.)

The bill also shows that after the railroad company became insolvent, it still owned its road bed and right of way, and that at some subsequent time, not stated, these were sold. But complainants having the only judgment then subsisting, this road bed and right of way should have been subjected to their judgment, if the judgment was not regarded as adjusted. The evidence does not show the value of the road bed and right of way, nor the manner in which they were sold.

Heman Ely, one of the complainants, testified in his deposition, taken on the 6th of February, 1869, that he had never heard of the compromise of the city's subscription until within the year preceding. That would make the date of his information subsequent to the bringing of the bill. (p. 84, ques. 10.)

But the attorneys who represented the interests of these complainants from the time of the Pepin suit down to the time of the Lindley suit, had full knowledge of the compromise when it was made. (p. 93, ques 9.)

At the time the compromise was made, S. & C. Howard seem to have been the holders of the bonds, in virtue of which complainants claim to be creditors, but they seem to have transferred them to complainants, and those under whom they claim, before Nov. 14, 1857, the date of the Pepin foreclosure judgment. These assignors of complainants, being the holders of the bonds at the time, had knowledge of the compromise at the time it was made. (p. 92, ques. 5, p. 109, ques. 18.)

That compromise was a matter of public notoriety. (p. 92, ques. 7, p. 108, ques. 11 and 12.) The city ordinance relating to it was published as required by law.

In the spring of 1858, (p. 92, ques. 6) complainant Heman

Ely, acting for himself and the other complainants, (p. 83, ques. 2) went to New Albany, for the purpose, as he said, of making a thorough examination into the affairs of the railroad company and the facts connected with the judgment. Mr. Smith testifies that he thinks Ely did make such examination, and also that upon that occasion Ely was expressly informed of the compromise, and that all matters connected with the railroad company were talked over with him by the directors. (p. 92, ques. 7.)

It is very difficult to believe that Mr. Ely went to New Albany at that time—March, 1858, as he states—to investigate the affairs of the railroad company, without hearing anything about that compromise. The stock list and other assets would receive early attention in any such investigation, and the city had been the largest subscriber to the stock. And then this prominent fact in the history of that railroad enterprise, was so publicly and notoriously known that it is impossible to suppose it could have escaped discovery in the course of any investigation, however slight.

While the long lapse of time is urged as an argument against Mr. Ely's cause, it may, at the same time, be suggested as the best apology for his forgetting that he had ever heard of that compromise.

During the ten years that intervened between the making of the compromise between the city and the railroad company and the filing of this bill, it was acquiesced in by creditors and the public generally. No question as to its validity was ever heard of, during all that time. (p. 93, ques. 8, p. 112 ques. 44.)

After the two Pepin foreclosures and the sale of all the lands of the railroad company, it was the understanding of the real estate bond holders—they having at the time fresh knowledge of the facts and circumstances—that the available means of the company were exhausted, and that, therefore, they would not be able to obtain anything more upon their judgments, (p. 108, ques. 10) and at least one of them was always under the impression that those lands were taken in full satisfaction of the bonds. (p. 183.)

The circumstances under which these dormant claims were revived after the lapse of one-third the life time of a generation,

are even less deserving of favorable regard in a court of equity, than the prior laches.

Whether a mistaken impression of the views of this Court upon the question of *the power* of a municipal corporation to compromise a stock subscription, derived from the case of Bell *v.* Railroad Company, may have suggested that a profitable speculation might be made by disturbing the repose of old and half forgotten settlements, we can not say. It is not improbable, however, that it was so, as these claims were revived shortly after the publication of that decision.

On the 18th and 21st of November and on the 9th of December, 1867, Mr. Burke, one of the complainants, purchased and took assignments of the interests of A. H. Moss, S. J. & C. D. Andrews, E. & R. C. Dewitt, and of Sarah Coit Day, in the lands that had been bid in under the mortgages, and all rights that they might have under or growing out of their bonds or foreclosure judgment in the Pepin case. (pp. 79, 80, 81.)

About the same time and upon similar terms the complainant Ely bought the interest of G. R. & H. C. Starr.

The aggregate of the claims purchased by Mr. Burke, as fixed in the Pepin foreclosure, was $21,735. The lands bid in under the two foreclosures were estimated by the parties, as above shown, in 1858, after the decline of prices in 1857, caused by the general financial depression of that year and by the failure of the railroad enterprise, as worth fifty cents on the dollar of the amount of the judgments. The evidence does not show the value of the lands in the fall of 1867 as compared with the summer of 1858, but as they were situate in, and adjacent to, a growing city, it is reasonable to assume that they were worth at least as much in 1867 as they had been in 1858.

The aggregate amount paid by Mr. Burke for these several assignments, as he shows in his deposition, was $5,500.

The lands alone, that he acquired, were worth at least $10,867.50. This much he secured at once and beyond any risk. He was, therefore, in a very safe position to incur the hazards of litigation to recover the remainder of the stale claim. The decree gives him $27,882, in addition to his lands.

When Mr. Burke bought these claims he knew that the city's subscription had been compromised ten years before. He must have known that it was the general understanding of the real

estate bond holders that they had received all that they were ever to get on their claims against the railroad company. He no doubt knew that the city's subscription had long before been adjudged unauthorized and void, and the city enjoined from levying taxes on account of it. He certainly knew that the whole subject of those railroad lands and mortgages was in litigation at the time in the Lindley suit. Yet, as he says in his deposition: "I took the above assignments of judgments subject to all risks and unpaid taxes and assessments upon the real estate, and subject to the existing litigation at that time. The consideration above specified covered not only their interests in the judgments or bonds above specified, but also their interest in the real estate held in trust by Heman Ely." (p. 116.) It appears elsewhere in the testimony that Heman Ely had acted in behalf of himself and of all the other bondholders whose interests are now represented by these complainants, and that the title to all their portion of the lands bid in under the mortgages, valued at $26,998, (p. 95) was made to and held by him as trustee. (p. 96, ques. 26.)

The trustee purchased the interests of some others of his *cestuis que trust*, upon the same advantageous terms. He and Mr. Burke seem to have moved concurrently.

Mr. Burke gives this grotesque explanation of the circumstances under which he was led into this speculation in stale claims: "I purchased upon the representations of others, and because I wanted a little outside business to occupy my leisure time, being at that time on the bench as Judge of the Court of Common Pleas and District Court in Ohio, and having considerable time * * *." (pp. 116, 117.)

Though the judicial ermine is thus spread over the transaction, it does not conceal its characteristic feature—that of maintenance.

The evidence does not show what their bonds cost the complainants, but it shows, as above mentioned, that they bought or acquired them after the compromise with the city. And it shows that at the time of that compromise their market value was only from 20 to 30 cents upon the dollar, (p. 114, ques. 9) and it is, therefore, probable that they cost complainants no more than about that price. If so, it furnishes a reason why

they may have been willing to accept an arrangement that produced them in value 50 cents upon the dollar.

An Indiana statute of limitations is as follows: "Sec. 210. The following actions shall be commenced within six years after the cause of action has accrued and not afterwards: * * * *Fourth.* For relief against frauds." (2 G. & H., 156.)

As no distinctions exist in that State between legal and equitable actions, this statute refers to relief against frauds in every form of action.

This provision is not understood to refer exclusively to cases where the cause of action arises directly out of the fraud complained of—as to obtain restoration of property fraudulently obtained—but it relates as well to fraudulent contracts that would affect the enforcement of pre-existing rights.

The corresponding statute of New York is in these terms: "Bills for relief against fraud shall be filed within six years after the discovery by the injured party of the facts constituting the fraud."

Eyre *v.* Beebe, 28 How., Pr. R. 333, was a creditors bill to set aside an assignment as fraudulent. It was not questioned in the case that the statute applied to it. The question was as to when it began to run, and it was held that it did not begin to run until the return of execution.

As between the railroad corporation itself and the city, the compromise contract was certainly valid. After it was made, the city owed the company nothing. The company could have maintained no action on the subscription against the city without first clearing the way by having that compromise set aside, and in any proceeding by the company against the city to obtain relief from the compromise contract on account of fraud, this statute, after the lapse of six years, would operate a bar. Here the city never owed the complainants, but it is proposed to subject it as a debtor of the railroad company to the payment of the debt of the company. They claim in right of the company and through the company. We submit that after this statute has run six years against them, they are barred equally with the creditor whose claims they seek to appropriate and enforce.

It is not practically important to inquire when, as against the complainants, this statute should be regarded as having commenced to run. It was not later than Dec. 1st, 1858, the day

the execution was returned, more than nine years before the filing of the bill.

The New York statute runs only from the discovery of the fraud. This Indiana statute, as construed by the Supreme Court, begins to run from the date of the fraud, no matter when it may have been discovered, so that it is not important whether Mr. Ely is correct or in error when he says he never heard of the compromise.

Pelcher *v.* Flinn, 30 Ind., 202.

This case also decides that the statute applies as well to suits in equity as at law.

That portion of the answer of the city setting up the compromise with the railroad company is framed with a special reference to this statute, and also with a general reference to the law of courts of equity, requiring reasonable diligence of suitors for equitable relief.

But with regard to the right of complainants to invoke equitable aid in the enforcement of this claim in *any form* against the railroad company itself or against *any* debtor of the company, as well as with regard to their right to attack the compromise, we rely on the established doctrine of courts of equity against laches.

The complainants' judgment itself had become stale before the filing of this bill. The code of the State provides that when a judgment shall have stood five years without execution, no execution shall issue except upon leave of the Court after notice to the defendant and until it shall be established by oath of the party or other satisfactory proof, that the judgment or some part of it remains unsatisfied and due. (2 G. & H. p. 230, Sec. 306, Laws Special Ses. 1865, p. 158.)

This judgment had stood for more than nine years without execution.

By the laws of the State, judgments of Courts of record are liens upon real estate for ten years from rendition, but after that time they ceased to be liens. (2 G. & H., p. 264, Sec. 527.) More than ten years had elapsed between the rendition of this judgment and the filing of the bill.

Not the slightest reason for the delay is suggested in the bill. It is not even a case of mere negligence in the pursuit of an

acknowledged right. It was the common understanding of the several classes of parties interested that no such right existed.

All the real estate bondholders, these included, regarded their claims as adjusted. All the promoters, officers, directors and stockholders of the railroad company regarded the affairs of that unfortunate enterprise as finally settled up, and as a thing altogether of the past. The city of New Albany, then weak and embarrassed, regarded its subscription as cancelled and that it had paid dearly for that object. Municipal government and management and all public improvements proceeded upon the supposition that the obligations and liabilities of the subscription had been fully discharged.

By general consent, the affairs of the railroad company were taken as closed, and consigned as to perpetual repose. This acquiescence had continued for ten years, when this bill was filed.

The equitable doctrine upon this subject is stated in Story's Equity Jurisprudence, (Vol. 2, p. 1520): "A defense, peculiar to Courts of Equity, is founded upon the mere lapse of time, and staleness of the claim, in cases where no statute of limitations directly governs the case. In such cases Courts of Equity sometimes act by analogy to the law; and sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere, when there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights."

An extract from the opinion of Lord Camden in Smith *v.* Clay, 3 Brown's Ch. R., p. —, has, on several occasions, been cited with approbation by this Court. "A court of equity, which never is active in relief against conscience, has always refused its aid to stale demands, where the party has slept upon his rights for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the Court is passive and does nothing; laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this Court."

(Piatt *v.* Vattier, 9 Pet., 405.

Bowman *v.* Wathen, 1 How., 189.)

Among the multitude of cases relating to the subject of laches, the one most analagous in its facts, to the case at bar, that we have met with, is Executors of Gilmore *v.* Bank of Cincinnati, 8 Ohio R., 62. It was a judgment creditors' bill to subject stock subscriptions and other debts due to an insolvent bank, to the payment of the judgment. The bill charged that the bank had become dissolved by non-user, that no officers had been chosen, nor had any business been done by the institution for several years past. Dates are not given in the statement of the case, but it was mentioned by counsel, in urging the lapse of time as a defense, that the bill was filed "ten or twelve years after the bank was broken up." The bill in this case was filed near eleven years after the corporation was broken up. In that case it was not pretended but that the stockholders would have been liable on proper call to the bank had it still continued in active existence, while in this case there would be no direct liability to the corporation, the subscription having been compromised and discharged, and the city having in fact ceased to be a stockholder.

That case was elaborately argued by able and distinguished counsel. Upon the question of lapse of time the Court held this language:

"The respondents insist that the lapse of time and change of circumstances forbid, that any of these (debts upon stock-subscriptions and for lent money) should be subjected in this case. And in this position we concur. In relation to the stock of this bank, to the debts due it, and due from it, all values have changed, whilst the complainants have been sleeping over, or creeping on in the pursuit of their rights. Changes of this kind have rendered it impracticable to do anything like equity among all who may possibly be affected. The case has become stale and is not to be favoured. * * * * In fact, all the cases concur that time may become decisive of a party's rights in a case like the present."

Maxwell *v.* Kennedy, 8 How., 210, was upon a bill filed by the personal representative of a judgment creditor against the heirs at law of the judgment debtor. The lapse of time was much greater than in the case at bar and the facts bear but little, if any, analogy, but the reasoning of the Court is very applicable.

In McKnight *v.* Taylor, 1 How., 161, a debtor had conveyed property in trust for the payment of several creditors, the trustee brought his bill to enforce the trust by sale of the property. The case made indicated that the debts had not in fact all been paid. The bill was filed after a lapse of about nineteen —less than twenty years. The Court say:

"If indeed the suit had been postponed a few months longer, twenty years would have expired, and in that case, according to the whole current of authorities, the debts in the schedule would all have been presumed to be paid. But we do not found our judgment upon the presumption of payment. For it is not merely on the presumption of payment, or in analogy to the statute of limitations, that a Court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence, to call into action the powers of the Court. In matters of account where they are not barred by the statute of limitations, Courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscured by time, and the evidence may be lost. The rule upon this subject must be considered as settled by the decision of this Court in the case of Piatt *v.* Vattier, 9 Peters, 416, and that nothing can call a Court of chancery into activity, but conscience, good faith, and reasonable diligence; and when these are wanting, the Court is passive and does nothing; and, therefore, from the beginning of equity jurisdiction, there was always a limitation of suit in that Court."

In the Court below, an artificial apology was framed for this unreasonable delay, somewhat after this fashion: That the city did not owe anything until the lapse of several years after the compromise, because many installments of interest were anticipated by the payment of the $36,000. That if interest should run on the entire $400,000 that payment of $36,000 would anticipate the coupons for say a year and a half. If computed on the $250,000 it would a little more than anticipate the coupons for two years. If computed on the $200,000 actually issued, it would anticipate the payment of coupons for about three years.

But this reasoning is subject to several objections.

First: The delay, though not quite so long, would still be unreasonable.

Second: The $36,000 were not paid *as interest*, but upon a compromise claimed to be fraudulent. A Court of equity would not, therefore, be required to apply that sum on the first installments of interest to fall due.

Third: It was not necessary that the complainants should wait until payment in money of any amount was actually due. If there was a subsisting obligation, a Court of equity could subject it, and adjudge that the city should pay at such future time and upon such future contingency as should seem just.

Fourth: The real foundation of the claim asserted against the city is its supposed failure to comply with the obligations of its subscription. But that obligation was for the issuing of *negotiable bonds*, not for payment of interest. Certainly not for the payment of interest on bonds not issued or outstanding. The obligation to pay interest would arise out of the bonds themselves—would be in fact a part, or an element, of the bonds.

The bonds not being outstanding nor in existence, the complainants have nothing to do with them. Their claim, if they have any, is upon the subscription calling for the bonds, and their cause of complaint, if they have any, is the failure to issue the bonds as provided for by the subscription.

A creditor's right in such case would be to have a decree placing a sufficient quantity of such negotiable bonds subject to the satisfaction of his demands, or to have paid to him, in money, the present money value of the subscription, as upon a failure upon the part of the city to comply with its terms.

There was, therefore, no legal reason why these complainants should not have resorted to their present remedy, the very day their execution was returned "*nulla bona*"—Dec. 1st, 1858.

This reason for the delay is evidently an after thought. It may seem ingenious, but it does not seem fit to influence the judgment of the chancellor.

V. *Upon the facts disclosed in the evidence there is a defect of necessary parties defendant.*

From the commissioners' report of sales under the first Pepin foreclosure, it appeared that after paying costs of suit, and after

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apportioning the remainder of the proceeds of sales *pro rata* among all the holders of the real estate bonds, there remained an unpaid balance of $85,319, "each of said several judgment plaintiffs herein, being entitled to recover of said deficiency, an amount proportionate to the relative amount of his separate judgment," and it was, therefore, ordered by the Court that they should have further execution accordingly. (p. 58.)

Pursuant to this order, a joint execution issued August 6th, 1858. (p. 66.)

These are the judgment and execution in aid of which this bill is brought.

The persons interested in the execution besides the complainants, are Victor A. Pepin, Walter Mann, Samuel H. Patterson, John S. Davis, Charles B. Applegate, Thomas L. Smith, John S. McDonald, William M. Wier and William B. Lent.

The interest of these other parties is precisely the same, in kind and degree, as that of complainants. Any money made upon that execution, or under that judgment must be distributed proportionately.

Some of the parties to that execution are before the Court, but not in their capacity as execution plaintiffs. They are brought in as stock subscribers, to the end that they may be required to pay to complainants exclusively, money that, if due at all, would belong to themselves as well, in their capacity as creditors under this execution.

But others of them are not in Court at all. Neither Pepin, Wier, Applegate nor Patterson were made parties to the bill, nor does the bill purport to be filed on behalf of complainants, and of other creditors who might choose to come in under it.

Story's Eq. Plead., Secs. 89 to 92, Sec. 99 and notes, Sec. 103 and notes, Sec. 157.

Adams Equity, pp. 715, 716.

We think, therefore, that it appears from this record that the complainants proceeded in a Court that had not jurisdiction, to enforce a debt that was not due them; against a party that owed nothing to their supposed debtor; after a lapse of time so great that the door to equitable relief would have been closed against even a meritorious demand; and without bringing before the Court all the parties that would be directly interested in such a controversy.

For the reasons assigned, we respectfully submit that the decree should be reversed.

T. A. HENDRICKS,
O. B. HORD,
A. W. HENDRICKS,
GEORGE V. HOWK,
For Appellant.

THE CROSS-APPEAL.

In case the cross-appeal taken in the Court below by these appellees against those defendants as to whom the bill was dismissed, shall be perfected and pressed in this Court, we will, as solicitors for those cross-appellees, have but little to submit, in addition to what we have had the honor to submit, as solicitors for the city of New Albany, upon its appeal.

All that relates to the compromise and cancellation of the city's subscription, is irrelevant to this cross-appeal, but every other point made and argument submitted, is as applicable in the one case as in the other.

The answer of these appellees (pp. 24 to 27) shows that they, with others, became subscribers to the capital stock, before the organization of the railroad company, by subscription to the Articles of Association. That this was done on the 22d of August, 1853. That their respective subscriptions were in sums exceeding $300, but that the amount in excess of $300, was conditional. The terms of the condition appear upon the face of the Articles of Association, which were made an exhibit with the Answer, (p. 28) and were as follows: "Provided, however, and it is hereby understood, that if the city of New Albany in its corporate capacity, shall hereafter take stock in this corporation to the amount of fifty thousand dollars, or upwards, inasmuch as the present subscribers, being residents of and owning property in said city, will then be under the necessity of contributing still further to the objects of the corporation by way of taxation, unless a portion of the present subscription is taken off their

hands, the said city shall accept in part of the amount to be subscribed in its corporate capacity, at its par value, a transfer of any amount of stock now subscribed for by each individual over and above the amount of six shares, or three hundred dollars, which each such individual may desire or request shall be so transferred."

Their answer avers that the city did, on the 18th of November, 1853, after the company had been organized, subscribe for $400,000 of the capital stock. That on the 31st of December, 1853, the board of directors of the company, by order duly made, authorized a transfer by the original subscribers, to the city, in accordance with the conditions annexed to their subscriptions. A copy of this order was exhibited with the answer. (p. 29.)

That immediately afterwards all the defendants did transfer accordingly, all their subscriptions in excess of $300, to the city, since which time they never claimed to be, nor have been recognized by the railroad company as, the owners of more than $300, each of the capital stock, or liable on account of the portion transferred to the city, it being regarded as a part of the city's subscription.

That all these transfers were made before any debt or obligation was contracted by the company.

That the six shares—$300—retained, had long since been fully paid for by each subscriber.

That since these transfers to the city, more than fourteen years had elapsed before the filing of the bill, during all of which time it had never been claimed or pretended by the railroad company, or by the complainants, or by any other person, that respondents were in any manner liable in respect of the stock transferred to the city, or in any manner whatever, upon their subscription.

The answer shows that there were many other subscribers, residents of the State, occupying similar relations to the company. Their names are given, and the amounts subscribed by them.

As to the Pepin foreclosure, and the agreement of parties respecting the division of the lands of the company, and as to the Lindley judgment, the answer adopts the answer of the city.

The Articles of Association showing the terms of subscription, and the resolution of the board of directors authorizing

the transfer of all of the stock subscribed in excess of six shares, and the merging of the same in the city's subscription, were put in evidence. (p. 86, p. 87.)

On final hearing it was admitted by complainants that in compliance with the resolution, and the condition contained in the Articles of Association, all these defendants had transferred their stock in excess of the $300. That this had been done before the 1st day of July, 1854. That none of them had ever been charged on the books of the company, with stock in excess of the $300. That as to his $300 so retained, each defendant had made full payment, long before the commencement of this suit, intending it as full satisfaction of all claims against him by reason of his subscription, and it being so received by the railroad company. And it was further admitted that each defendant had in like manner fully paid for any and all other stock in the railroad company ever at any time subscribed. (p. 89.)

A technical objection to the validity of the condition contained in the subscription and to the merger of the excess of the subscriptions over $300, in the subscription of the city, was made in the Court below, founded upon Bedford R. R. Co. *v.* Bowser, 48 Penna , 29.

In that case a condition annexed to that subscription, which was one of a number taken by a commissioner, preparatory to the procurement of a charter, was void, for the reason that the commissioner had no power to accept a conditional subscription.

In this case no commissioner intervened. The articles and the subscription were the result of voluntary associated action. If the subscriptions were not such as the railroad law contemplated or authorized, it would in this case simply result that there never was such a corporation as the New Albany and Sandusky City Junction Railroad Company. To establish this would be fatal to the claims of the holders of corporate bonds of the company.

We think, however, there is nothing in the objection.

The first Section of the general railroad law provides that when stock to the amount of $50,000, or $1,000 for each mile of road, shall have been subscribed, the subscribers may organize, make articles of association, and become incorporated. (1 G. & H., p. 504.

Here there was no fraud upon other stockholders, for the con-

dition was openly and mutually made. It was a question between the association and the State, only. The State has never interfered by *quo warranto*, or otherwise. Indeed, so far as the State was concerned, the object of the statute was accomplished. A sufficiency of stock to answer its requirements was secured absolutely. There was simply reserved in express terms, a right to do an act, the right to do which would have existed if not expressly reserved, viz.: to sell and transfer to the city of New Albany a part of the stock so subscribed.

The city authorities attempted, at least, to subscribe. The railroad corporation recognized the validity of the subscription, and permitted these defendants to merge a portion of their stock in the subscription made or attempted by the city. At the time this was done no person but the railroad company or the State would have had a right to question the arrangement, for no debts existed.

After the lapse of fourteen or fifteen years, during which every person interested fully acquiesced in the arrangement, it would seem that sharp technical objections to its validity, should be entitled to but little favorable consideration in a Court of equity or elsewhere.

T. A. HENDRICKS,
O. B. HORD,
A. W. HENDRICKS,
GEORGE V. HOWK,
For Cross-Appellees.

115

Supreme Court of the United States.

THE CITY OF NEW ALBANY, Appellant,

vs.

JOHN PHELPS PUTNAM *et al.*, Appellees.

115

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF INDIANA

ADDITIONAL BRIEF FOR APPELLANT FILED ON LEAVE OF THE COURT.

In view of the full brief now on file herein, and the able oral argument made by Mr. Hendricks for the appellant, and of my exacting official duties, I will make this argument short, and confine it to a few only of the points comprised in the case.

To the *personal* allusions in the brief of the appellees, whether to myself or to my late law partner, Hon. Thomas L. Smith, an ex-judge of our supreme court, and an upright and honorable man, I have only to say, that, so far as they impute improper motives or conduct, they are grosssly unjust and unfounded.

JURISDICTION.

It is true that in Noonan *vs.* Lee, (2 Black, 499,) it is held, that "the equity jurisdiction of the courts of the United States is derived from the Constitution and laws of the United States, and their power and rules of decision are the same in all the States." We do not question that.

But we say it is not decisive of this case on this point. The subject-matter on which the court acts is altogether distinct from its constitutional powers. It must obtain control of that subject-matter in some proper way. Its power to give relief in a proceeding by creditor's bill is founded upon the local law of the State, which must authorize such a proceeding after judgment and execution. (3 McLean, 270; 4 McLean, 12; Id., 122; 6 Id., 16.)

In this controversy the local courts acquired jurisdiction many years before any appeal was ever made to the federal court. That jurisdiction is exclusive.

There is no principle better settled than that, when two or more tribunals have a concurrent jurisdiction over the same subject-matter and the parties, a suit commenced in any one of them may be pleaded in abatement to an action for the same cause in any other. (Shelby *vs.* Bacon, 10 How., 68; 20 How., 594; 24 How., 450; 6 Wall., 166; 10 Wheat., 4; 2 Black, 585.)

In Indiana, by the Code of 1852, all distinctions between common law and equity jurisdiction were abolished. As to most actions new forms were prescribed. Creditors' bills were entirely superseded by what are called "proceedings supplementary to execution." (Art. 23, Rev. Stat. of Ind.; 2 Gavin & Hord, 260; 5 Ind., 380; Id., 407; 6 Ind., 176; Id., 410; 7 Ind., 622; 27 Ind., 384; 9 Ind, 202; 11 Ind., 327; 19 Ind., 197; rule XX of the U. S. Cir. Ct. for the Dist. of Ind. expressly adopts art. 23 of the Code of Ind.)

In the case now being considered, the bill seeks no discovery and alleges no fraud. It presents no ground for chancery jurisdiction, except the allegation that some of the defendants are indebted to the railroad company. But for all such grounds of recovery the complainants have the most adequate and ample remedy under the Code. This proceeding by creditor's bill is not an original suit, but an extension or continuation of a former controversy. (4 McLean, 112.) Why did not the parties exhaust their remedy under this Code?

Shields *vs.* Thomas, (18 How., 253,) cited by appellees, is no authority against our position. It was an action in the district court of Iowa, based upon a judgment rendered in Kentucky by a State court. That is all. Neither is the case of Barber *vs.* Barber (21 How., 582) adverse to our position. That, too, was an action in the district court of Wisconsin, based on a judgment for alimony, rendered by a State court of New York. No such facts or conditions existed in those cases as distinguish the one at bar. It cannot be doubted that the remedy under our Code is as "practical and efficacious to the ends of justice and its prompt administration as the remedy in equity." It is more so, as every lawyer will testify who is familiar with practice under the Code. Still less does the case of Ogilvie *vs.* Knox Ins. Co. antagonize our views. That case was instituted in the United States district court for Indiana before the adoption of the Code, and no question of jurisdiction was raised or decided in it. (22 How., 280; 2 Black, 539.) No more relevancy is there in the citation of Wylie *vs.* Coxe, (15 How., 416,) because the facts of the case entirely distinguish it from the one at bar. In that case the court assert jurisdiction on the express theory that "a court of equity can exercise jurisdiction over the case if a *more* adequate remedy can be thus obtained than in a court of law." We need not refer to other cases relied on by the appellees.

THE COMPROMISE—POWER OF CITY TO MAKE IT.

Passing over several questions of greater or less importance, it may be well to notice somewhat the above matters.

None of the bonds issued by the city to the New Albany and Sandusky City Junction Railroad Company are now outstanding, except *seven*. About them there is no controversy. The commercial character of such obligations is therefore not involved in this case as a ground of recovery. The 193 bonds of the 200 issued were surrendered by the railroad company to the city.

The complete *bona fides* of the adjustment between the

railroad company and city is established by the testimony and the record evidence. The city was in imminent danger of great financial embarrassment. The railroad company, by reason of many events and conditions, had become unable to prosecute successfully its enterprise. The financial crisis of 1857 was upon the country, and the civil war rapidly developing. The *only* power in existence at that time that could by any means protect the interests of the city against financial disaster and ruin was the common council of the city. To it, under the charter, was committed the general supervision, direction, and guardianship of all its corporate interests. Blackstone, (1 Com., 477,) says:

"That the general duties of all bodies politic may, like those of natural persons, be reduced to this single one, of acting up to the end or design, whatever it be, for which they were created."

Omitting the repetition of some parts of the history of the subscription and adjustment in question, which are fully given in the appellant's printed brief on file, I further note, that no part of the railroad ever was completed. The city, therefore, under the terms of the compromise, never became liable for more than $250,000. Of this sum $200,000 was paid by its bonds. The company relied on the sale of these bonds to procure means to prosecute the work. Seven of these were sold, and, as stated, are outstanding. Litigation was soon commenced, bringing in question the validity of the subscription. Severe times intervened. By these and other influences the market value of the bonds was well-nigh destroyed. Capitalists became alarmed. The bonds would not sell, except at a fatal sacrifice.

Meanwhile the company had borrowed money of the Ohio Insurance Company. To secure that, it pledged about $80,000 or more of the bonds. The company was soon compelled to suspend work, and then to abandon its enterprise. The pending suits were continually increasing doubt and depreciating the securities. The Ohio Insur-

ance Company threatened to sell the pledged bonds. The company had no means to pay except by their sale.
Under these circumstances the compromise was made August 17, 1857. The city paid the debt of $36,000, due the Ohio Insurance Company, and certain expenses and costs, amounting to several thousand dollars more. The company, in consideration of all these facts and circumstances, in good faith, surrendered and canceled all the $193,000 of bonds, and all the city's subscription.

It is clear, from the evidence, that the city thus paid more for these bonds and the subscription than the whole could then, or for years thereafter, if ever, have been sold for to any other party. I verily believe that the company could not, by any effort, have disposed of them to better advantage for its own interests or those of its creditors.

I assume it is clear and beyond question, that the company, never having completed any part of its road, could never, under the terms of the ratification, have legally demanded of the city more than the $250,000, Suppose, then, that the company had called for the remaining $50,000 in the city's bonds, and then sold those bonds with the $193,000 previously issued, for the best price then obtainable, and with the proceeds had paid the Ohio Insurance Company and the costs and expenses referred to: Can it be supposed either the company or its creditors would be in any better situation? It appears to me very manifest, from all the facts and surroundings, that they would not.

What, then, has the company done? It has, in legal effect, sold its bonds. The city bought them. Both acted in good faith. The one had a right to sell, the other to purchase.

That the city were legally competent to make the conditional subscription and ratification, the E. I. and C. R. R. Co. *vs.* The City of Evansville, (15 Ind., 395,) is an authority in point. It appears to be sound law that corporations generally, when authorized to contract in reference to any specific subject-matter, possess all the powers of individuals as to the manner, particular conditions, or details, that may be agreed upon.

The court say, (4 Peters, 514):

"The great object of an incorporation is to bestow the character and properties of individuals on a collected and changing body of men."

See also 1 Sandf. Ch. R., 280: 25 Ind., 536; 1 Barb., 584; 10 Ind., 244; Pierce on Railways, 70, 71; 10 Ind., 187; 19 Ind., 213.

But it is claimed that, by reason of the rule of law announced in the case of Bell *vs.* Railroad Company, (4 Wall., 598,) this compromise is absolutely void, even as between the railroad company and the city. After a careful consideration of that decision, and like examination of the law of Mississippi, under which the subscription in that case was made, I very confidently submit that the case at bar and that one are very different, and distinguishable in their facts and law.

The general objects, scope, and incidents of the powers conferred upon the city of New Albany, by its charter and the general laws of the State, greatly exceed those of the police board under the laws of Mississippi. The conditions and circumstances of the two communities demand very different degrees of power and discretion.

In the case of Bell *vs.* Railroad Company, the subscription was made in legal effect by a popular vote, and was absolute.

In the case at bar, the vote was had; then a subscription was attempted under it; then the law was adjudged invalid; then another was enacted, not validating the subscription, but empowering the city to do so, yet not *requiring* it to do so, nor if it did so, to do it without condition. Thus, in legal effect, giving original power to the city to subscribe or not, upon conditions or without them, and by fair implication, to do whatever the best interests of the citizens might require in that behalf.

In Bell *vs.* Railroad Company, from some cause, the police board failed to make the subscription in fact, but it did levy a tax to pay it. Litigation arose over it, and a compromise was made. The railroad company released

the county on condition that the latter would pay it a certain *bonus*. This *bonus* was the money collected on the tax levied to pay the subscription. This was in the hands of the sheriff, who was *ex officio* collector of the county. The president of the board of police ordered him to pay it to the railroad company. He refused. Hence the suit. The district court adjudged that he should pay it. The Supreme Court affirmed that judgment, on the ground that it was his *official duty* to pay it on the order of the police board. *That was the point decided in the case.* What was the agreement, held to be void? The police board was authorized to make *a subscription for stock*. Instead of doing that, it agreed to give the money levied and collected for that purpose to the railroad company *as a bonus*. That the court say it had no power to do. And this decision may well stand, and yet not be at all applicable to the case at bar. It was surely not the intention of the Supreme Court, or of the very learned Justice who gave the opinion in question, to hold that a municipal corporation, authorized to make such a subscription, could do nothing more than simply sign the subscription papers.

Was the compromise fraudulent and void against complainants?

I think the record very fully establishes the complete good faith of the parties to the adjustment. What facts, then, render it void or fraudulent in law? The adjustment was based upon valuable and adequate considerations. It was made without any badges or indicia of fraud. Fraud is generally a question of fact. If the vicious intent be apparent upon the face of a transaction, fraud may be assumed as a conclusion of law. But that is not the case here.

Under the laws of Indiana it has been repeatedly held, that conveyances made with intent to defraud creditors are, nevertheless, valid between parties. They are voidable at the instance of creditors and those succeeding to their rights only. (1 Blackf., 262; 7 Blackf., 66; 2 Ind., 196; 20 Ind., 484; 21 Ind., 489.)

In the case of the Philadelphia and West Chester Railway Company *vs.* Hickman, (28 Penn. St. R., 318,) the Supreme Court of that State says: "As an incident to the power to conduct the business of the company, the corporation possesses authority to compromise disputes; and if, in the collection of subscriptions it is found necessary, in order to secure part of a doubtful claim, or of one which cannot be collected by reason of the insolvency of the debtor, they may release a part for the purpose of securing the residue. *This power must be understood as within the contemplation of all persons when they become stockholders. All that is regarded is good faith in its exercise.*" Can this principle be less applicable to municipal than to railroad corporations? Or to bondholders than to stockholders? (See also 1 Redf. on Law of Railways, 3d ed., 207, note.)

It is generally true, that shareholders cannot exonerate themselves from their statutory liability, either for the debts of the company, or for expenses incurred, by a transfer of their shares to irresponsible persons. But where the transfer is made for the purpose of enabling the transferee to become a director, or for any other *bone fide* purpose, and not merely to avoid the statutory responsibility, it will be regarded as valid and not impeachable in equity. *And even when sold at a nominal price, and because the vendor anticipated a disastrous result in the affairs of the company, if bona fide, and no trust exists in behalf of the vendor, it will be regarded as valid.* (2 Redf. on Law of Railways, 625, 3d ed.)

Relying with entire confidence in the ability and fullness with which other points arising upon the record are made in the brief on file for the appellants, and the argument of Mr. Hendricks, I will, without further suggestion, submit the case.

M. C. Kerr,
For Appellant.

In the Supreme Court of the United States.

THE CITY OF NEW ALBANY, Appellant,

vs.

JOHN PHELPS PUTNAM AND OTHERS, Appellees.

ARGUMENT FOR APPELLEES.

PORTER & HARRISON AND S. BURKE,

SOLICITORS.

W. S. ROBISON & CO., PRINTERS, 65 & 67 FRANKFORT ST., CLEVELAND.

Bill further alleges that the City of New Albany is indebted to the Railroad Company in the sum of $193,000 00 on its bonds issued, and in the sum of $200,000 00 upon subscriptions payable in bonds. That the bonds issued and to be issued will fall due in 1874, and that the bonds draw interest at six per cent. from January 1st, 1856, and that there was due at the filing of the bill more than $70,000 00 of interest, from the city, upon the bonds issued.

The Bill further alleges that the other defendants are severally indebted to the Railroad Company in sundry amounts upon subscriptions made to them for its stock, for the purpose of organizing a railroad company.

It is also further stated that the City of New Albany pretends to have made some compromise or arrangement with the Railroad Company by which it has been released from its subscription, and its bonds, to the amount of $193,000 00, were returned and cancelled. The complainants charge that such pretended arrangement was fraudulent in law and in fact, and that it is null and void; not only because of the fraud alleged, but also because of the want of power upon the part of the officers of the city and of the railroad company, to make such compromise.

DEMURRER TO THE BILL.

The defendants, the City of New Albany and the individual subscribers for stock, filed demurrers to the Bill, on the ground that the Circuit Court had no jurisdiction to enforce or aid in the collection of a judgment rendered in the state courts. Upon hearing, the demurrer was overruled and the defendants were rebuired to answer.

ANSWER OF THE CITY.

The City admits that on the 19th day of November, 1853, it in form subscribed for $400,000 00 of the stock of the Railroad Company, and sets out in its answer a copy of the ordinance under which the subscription was made, and a copy of the subscription. It denies the legality of the subscription, alleges that the complainants claim that the city ratified the subscription under the authority of the special act of the General Assembly, of February 21st, 1855, but denies that the city ever did ratify the subscription under the authority of that act or any other.

The City admits the issuing and delivery to the Railroad Company of $200,000 00 in its bonds, as charged; $100,000 00 of which were issued before and $100,000 00 after, the passage of the act authorizing the city to ratify such subscription.

The city further, and by way of defense, alleges that some time after the issuing of the bonds to the railroad company, sundry citizens of the City of New Albany, claiming that the subscription by the city was unauthorized, and that the taxes assessed in pursuance of the ordinance of subscription were illegal, commenced and carried on sundry suits in the Circuit Court of Floyd County, Indiana, to enjoin and restrain the collection of such taxes, and that under the decline in the bonds caused by such suits and the suspension of work on the railroad, the city made a compromise with the railroad company by which it paid $36,000 00 of the debts of the railroad company in consideration of which $192,000 of its bonds and coupons were surrendered by the railroad company and its subscription cancelled. That such compromise was made nearly ten years before this suit was commenced and no one had ever taken any steps to set it aside.

The city admits the recovery of the judgment by Pierson and Seymour as alleged and recites at length the mortgage upon which the recovery was had and claims that Pierson and Seymour were trustees only as to the mortgaged premises and not as to the debts, and that therefore the judgment was not available to the complainants.

The city also claims that another mortgage was made to some of the holders of real estate bonds, railroad bonds secured upon certain real estate not embraced in the mortgage to Pierson and Seymour, and that this real estate was also sold and the proceeds applied upon the amount due to the complainants and others who held the real estate bonds, and that thereby the complainants recovered much more of their debt than if said second mortgage had not been made.

The city further states that after the recovery of said judgments by Pierson and Seymour for the use of the complainants and those under whom they claim, and after the sale of the mortgaged premises embraced in both mortgages, and the application of the proceeds upon the judgments or decrees, one William Lindley, a holder of three of the real estate bonds embraced in

the mortgage to Pierson and Seymour, and who was not a party in the suit for foreclosure of said mortgage, and in which said judgment or decree was rendered in favor of Pierson and Seymour for the use of the complainants, filed, on the 19th day of February, 1863, his complaint in said Floyd Circuit Court, against said Railroad Company, Pierson and Seymour, the complainants and those under whom they claim, and all others interested, to obtain another foreclosure of said mortgage to Pierson and Seymour and a new sale of said mortgaged premises.

That said cause was pending in said Court in Floyd County, until the 19th day of February, 1868, when it was finally decided. And the Court in said case assumed to find that by the agreement of the parties to said judgment of foreclosure, who were the holders of said bonds, the said mortgaged premises were received by them in full payment, satisfaction and extinguishment of all claims and demands against said Railroad Company or any other person upon said bonds and the judgment rendered thereon; and that by this judgment, the demands of the complainants under the judgment of November 14th, 1857, for $54,855 00, were extinguished and paid.

ANSWER OF THE RAILROAD COMPANY.

The Railroad Company admits the recovery of the judgment as alleged in the Bill, but says that there was no order in the judgment for execution to issue to collect the balance after the mortgaged premises were sold.

The Railroad Company also claims that the Circuit Court of Floyd County, found that the parties to the former judgment had received the bonds in the mortgage described in full payment of their claims and demands on the bonds and judgments.

The Railroad Company affirms the validity of the compromise made with the city by which the bonds were surrendered and the city subscription collected and that no steps have been taken until this suit to set aside such compromise.

ANSWER OF INDIVIDUAL SUBSCRIBERS.

Thomas L. Smith and twenty-seven others jointly answer and admit that they did, on the 22d day of August, 1863, subscribe for stock as alleged in the bill, but claim that in pursuance of

stipulation or condition in the contract of subscription and a resolution of the Railroad Company, nearly all of the stock subscribed by them was assigned by them to the city and merged in the $400,000 00 stock subscribed by the city. They do not aver that the city accepted such assignment, but say it knew of it and acquiesced therein. They admit the insolvency of the Railroad Company, as do all the other defendants. They adopt the answer of the city so far as it sets up the proceedings of the Circuit Court of Floyd County, in the case of William Lindley *vs.* The Railroad Company and others above named.

REPLICATION.

The complainants filed a general replication to the answers of all of the defendants except E. R. Day, who took no appeal and is not before the Court.

The questions presented by the pleadings were submitted to the Circuit Court for hearing at its May term, 1869, and a decree was rendered in favor of the complainants for the balance due on their judgments, amounting to over $70,000 00 in the aggregate, against the Railroad Company and the city, and dismissing the bill as to Thomas L. Smith and his twenty-seven associates; from this decree the city appealed to this Court, and the complainants also appealed as against Smith and his associates.

The facts are substantially as follows, as shown by the pleadings and evidence:

1st.—That the plaintiffs, through their trustees, Pierson and Seymour, recovered a judgment, November 14th, 1857, for $54,855 00.

2d.—That an order of sale of the mortgaged premises was issued, and a sale thereof made, the property being first *very extensively* advertised, and between $13,000 00 and $14,000 00, as shown by the return, applied on plaintiffs' judgment.

3d.—That the judgment was personal against the Railroad Company, and after the return of the order of sale the Court awarded further execution, and execution was thereupon issued in due form and returned *nulla bona*.

4th.—That the Railroad was insolvent at the time of and long before Nov. 14th, 1857, at least as early as April, as shown by the compromise resolutions of August 17th, 1857—see record, pages

81 and 82—and that the Company still is insolvent, of which the city had full notice at the time of the compromise.

5th.—That the city, November 19th, 1853, subscribed $400,000 00 to the capital stock of the Company, to be paid in bonds *on the call of the Company*, and on or about January 1st, 1854, issued $100,000 00 in city bonds in payment therefor, and on the first of January, 1856, $100,000 00 more, and delivered them to the Company.

6th.—That the city, March 7th, 1855, ratified the subscription by an ordinance, passed expressly for that purpose.

7th.—That the City afterwards levied taxes to pay interest on the bonds, and is paying the interest on seven of them yet.

8th.—That the City voted at all elections for directors, and was received and treated as a stock-holder up to the compromise, since which time no elections have been held.

9th.—That the general incorporation law of 1852 was in force in New Albany in 1853, and still is in force.

10th.—That all the bonds issued by the City to the Railroad Company will fall due in 1874, interest being due thereon now to the amount of about one hundred thousand dollars.

11th.—That on the 16th of August, 1857, $80,000 of said bonds were in the hands of the Ohio Insurance Company as security for about $36,000, and upon the pretense of redeeming said bonds or preventing their sacrifice, the Railroad Company being insolvent, which was well known to the City, the Railroad Company surrendered to the City the $193,000 of bonds under its control, and cancelled the subscription for $200,000 more on condition that the City would pay the debt to the Insurance Company.

12th.—That neither Mr. Ely nor any other creditor knew of this compromise until about January first, 1868, when this bill was filed.

13th.—As to the other Defendants some other facts appear:

First.—That $148,750 was subscribed to the articles of association by fifty-five persons.

Second.—That if the release or proviso in the articles of association is valid, the $148,750 originally subscribed could be reduced to $16,500,—$300 each for the fifty-five subscribers

Third.—That many of the subscribers, not all, did assign or release or "merge," or whatever else it may be called, to the City, the stock by them subscribed, except $300.

Fourth.—That such assignments were only to be made if the City took stock, and there is no pretended power to make them if it did not.

Fifth.—That neither the subscribers nor the City have ever been called upon to pay, or have paid, any part of the $132,250 so assigned or pretended to be assigned to the city.

Sixth.—That the only pretended authority for merging or wiping out said stock is found in the proviso of the articles of association and the resolution of the railroad directors of December 31st, 1852, copies of which are attached to the answer of said Defendants.

Seventh.—That the City never accepted said assignments and had no power to do so.

Eighth.—That all of the directors voting for the resolutions were interested in making such assignments and availed themselves of its provisions by assigning to the City.

THE QUESTIONS PRESENTED.

The first question presented arises upon the Demurrer to the Bill. The only ground of demurrer specified is that the Circuit Court had no jurisdiction of the subject matter of the action. This point has been so frequently decided by this Court that it cannot now be regarded as an open question. The precise question was decided in the case of Shield vs. Thomas et al. 18th Howard, 253—and Barber vs. Barber et al. 21 Howard, 582. The case of Ogilvie vs. Knox Insurance Company which came before this Court twice and is reported 22 Howard 280, and 2 Black 539. See also Story's Eq. Pl. sect. 429,–430,–431; 3d Wheat. 212; 6 Pet. 648; 12 do. 359; 15 do. 9.

It is urged that this is a judgment creditors bill only, and therefore this Court has no jurisdiction. The foregoing cases show that if it was a judgment creditors' bill only, this Court would clearly have jurisdiction. But this is not such a bill only; it is more than that, and this Court has jurisdiction on other grounds also. The record, page 49, shows that *none of the com-*

plainants, or those under whom they claim, were parties in the Pepin case. They had no notice of the pendency of that suit. They filed no answer therein. The Trustees, Pierson and Seymour, filed an answer therein, and having ascertained from S. & C. Howard that complainants were the owners of the bonds, they stated the facts in their answer and took judgment in their own names as such Trustees for the use of the complainants. And while the record, page 49, shows the interest of each of the complainants in that judgment, still the judgment is in the names of the Trustees, and it is very doubtful whether either of the beneficiaries in that judgment could sue the Railroad Company in an action at law and recover a judgment for his interest therein, and yet none of them has any interest whatever in a recovery by the other. Under such circumstances, the case seems to us a very clear one for a proceeding in equity. It is very much like the case of Shields vs. Thomas et al., 18th How. 253, above cited. Upon such a state of facts, it seems to us that a Court of Equity is alone competent to marshal assets, ascertain the balance due to each beneficiary in the judgment or decree, and do full and complete justice between the parties. The following authorities clearly sustain this position: 4 Halst Ch. Rep. 175; 6 Calif. 376; 20 Alabama, 662; 6 McLean, 18; Story's Eq. Pl., 429-431; 4th McLean, 112; 14th How. 29; 12 Gill & Jons, 442; 15 How. 416.

The answer filed by Pierson & Seymour, and upon which this judgment was recovered, is not in the record, it appears to be lost (see record, page 48). That Pierson & Seymour filed an answer on which the judgment was rendered appears from the answer of the City (see page 18 of record).

The answer of S. & C. Howard, page 47, shows that they received all of the bonds on which complainants, judgments were rendered, from the Railroad Company, for work done on the road under the contract, and sold them to the complainants for a full and adequate consideration.

The liability of the City depends on *three* questions:

First.—Were the subscription and the bonds issued in pursuance thereof valid?

Second.—Was the compromise between the City and the Railroad Company valid? And

Third.—Was the judgment of the Complainants satisfied and extinguished by the judgment of the Floyd Circuit Court, rendered since the commencement of this suit in the Circuit Court?

As to the first point, we maintain that the subscription by the City was valid and binding, and constituted the City a stockholder in the Railroad Company. The subscription itself as made by the Mayor, November 19th, 1853, and the ordinance of the Common Council authorizing the same, are copied into the answer of the City and will be found on pages 13 and 14 of the printed record.

At the time the subscription was made it was supposed that the City had the power to subscribe for stock in railroads under the 56th section of an act of the General Assembly of the State of Indiana for the incorporation of cities, passed and approved June 18th, 1852, which act was in force in the City of New Albany at the time of the subscription, but the Supreme Court of the State having decided in the 5th Indiana Rept. 38, that no such power was conferred by the 56th section of the act above cited, and that no such power was possessed by cities organized under the general incorporation act of June 18th, 1852, the General Assembly of the State, on the 21st of February, 1855, passed an act to enable such cities to ratify subscriptions previously made, which act provides as follows:

"That the Common Council of any city which has contracted obligations "or liabilities by subscribing for the stock of any company, incorporated for "the construction of any railroad or other work of public utility to such city, "upon the written petition of three fourths of the legal voters thereof, under "the provisions of the 56th section of the general act for the incorporation "of cities, upon the supposition it was authorized to do so by said section, "may at any time after the passage of this act, ratify and affirm such "subscription, and upon such ratification, *such subscription, and the obligations "and liabilities and the corporate bonds issued or to be issued therefor by such city, "shall be valid.*"

In pursuance of this statute, on the 7th day of March, 1855, the Common Council of the City of New Albany passed an ordinance ratifying and affirming the subscription above mentioned, which ordinance, after the preamble, reads as follows:

"*It is hereby ordained*, That said subscription made by Joseph A. Moffatt "for eight thousand shares of the capital stock of said Company in the name "and on behalf of the City, be and the same is hereby now ratified and "affirmed, and all the provisions of said ordinance, by virtue of which said "subscription was made, shall remain in full force."

The act of the General Assembly above named and the ordinance of ratification will be found in full on pages 65 and 66, printed records, and by them the subscription became as legal and binding upon the City as if the power to make it had preceded the subscription, as was distinctly settled under the same statute in the case of Bissell vs. Jeffersonville, 24th How. 288.

It will be observed that the statute prescribed no particular *mode* of ratification. Authority to ratify was conferred upon the Common Council; the *mode* of its exercise was left to the discretion of the Council. The Common Council of the City of New Albany not only ratified the subscription in direct terms by the above cited ordinance, but also ratified the same by the issuing and delivering to the Railroad Company on the first of January, 1856, one hundred thousand dollars in bonds in part payment of such subscription; by levying taxes to pay the interest upon said bonds, and by *voting upon the stock thus acquired at every election of directors and officers ever held by said Company*, all of which appears by the proceedings of the Common Council, (see printed record, pages 68 to 71,) and by evidence of James Montgomery, President of the Railroad Company, page 112.

The statute above cited, provides that "upon such ratification, "such subscription and liabilities and the corporate bonds or "obligations issued or to be issued therefor by such city shall be "valid."

In view of this statute and the facts above mentioned, we do not suppose it will longer be contended that the City of New Albany did not become a stock-holder in the Railroad Company to the amount of $400,000. Such fact must be apparent to any one; and it is also equally apparent that by the issuing of $200,000 of its corporate bonds and delivering the same to the Company in exchange for its stock, the City became indebted to the Railroad Company to the amount of its bonds so issued as clearly as a natural person would who issued his promissory notes in payment or on account of stock issued to him.

Such bonds thereby became a part of the capital stock of the Railroad Company and pledged for the payment of the debts.

We do not deem it necessary to discuss the question in this Court of the power of a City to subscribe for stock in a Railroad Company when authorized to do so by the Legislature; nor to

discuss the question of the power of the Legislature to confer power upon a City to ratify a subscription originally made without authority; nor to discuss the effect of such ratification when made by the Legislature or by the City, under Legislative authority.

All such questions have been settled by this Court and have become a part of the well settled law of the country. See 24th How. 288 and cases there cited.

IS THE COMPROMISE SET UP BY THE CITY VALID?

The subscription, by the City, being legal and valid, and the corporate bonds issued by the City constituting a valid indebtedness against the City, we come to the *second* ground of defense of the City: the validity of the compromise of September 8th, 1857, between the City and the Railroad Company. (See page 87 printed record for acceptance of proposition of the City by the Railroad Company.)

We claim that this alleged compromise is utterly null and void and constitutes no defense to the action.

It is clearly void upon the principles settled by this Court in the case of Bell vs. Railroad Company, 4th Wall, 598. The principle there settled is, that the officers of a municipal corporation authorized, by special statute and vote of the people, to subscribe for stock in a railroad company, have no power to compromise such subscription and abandon the enterprise.

That all their power is derived from the statute and the vote of the people, and that whenever the subscription is made and the corporate bonds delivered, their power ceases, and they have no more power to compromise the subscription or abandon the enterprise than any other residents of the municipality.

A reference to ordinance of the Common Council providing for the subscription in this case, (see record, pages 13 and 14,) will show that there are very cogent reasons why the Common Council should have no power to release the city subscription and surrender the stock. The 4th section of the ordinance provides for a special levy of taxes for railroad purposes to pay the

interest, and a sinking fund to liquidate the principal, and the issuing of certificates for the amount of such taxes to the tax-payers; and the 5th section provides that the mayor upon presentation of such certificates shall transfer to the holders thereof railroad stock owned by the City equal in amount to the certificates surrendered. It thus appears from this ordinance itself that the tax-payers of the City acquired a vested interest in the stock of the Railroad Company and had the right to such an amount as the taxes from time to time paid by them, would entitle them to.

The contract of subscription thus became to all intents and purposes a contract between the Railroad Company and every tax-payer of the City, the Common Council acting only as the special agent of the tax-payers to make and carry out the contract with the Railroad Company, and to provide for the raising of the money to pay the principal and interest of the debt contracted and the distribution of the stock to the tax-payers in proportion to the amount of taxes paid. What power, under such an ordinance, had the Common Council, without authority from the tax-payers of the City or the Legislature, to compromise the subscription voted by the people, and in which the people were interested? Suppose the stock to have been worth a large premium, what right would the Common Council have to relinquish it at par? Clearly none.

The question is one of power in the Common Council. If such power resided in the Council, then when and how it should be exercised were matters of discretion, but if no such power was possessed, the value of the stock or the wisdom of the enterprise would not confer it.

We conclude, therefore, that the act of the Common Council in making such compromise was without authority and void.

THE COMPROMISE FRAUDULENT.

But conceding that the Common Council had as full power to compromise the City subscription, as an individual, we nevertheless maintain that such compromise is void as against us because it is fraudulent in law and in fact.

That such compromise is fraudulent in fact, appears plainly from the record, page 34. It there appears that on the 22d day

of August, 1857, Victor A. Pepin filed his complaint in the Circuit Court of Floyd county, Indiana, to foreclose the mortgage upon which, and the bonds described therein, our judgments were recovered on November 4th, 1857, and that such suit was pending in court from August 22d, 1857, until judgment.

The ordinance providing for a compromise was passed by the Common Council, August 17th, 1857, (see page 81) and was accepted by the Railroad Company on the 8th day of September, 1857. (See page 87.)

The compromise was made pending the suit to foreclose the mortgage and recover judgment on the bonds.

The excuse for the compromise was, that the bonds delivered to the Railroad Company had been pledged to the Ohio Insurance Company for some $30,000 00 money borrowed, and if the bonds were not redeemed they would be sold at a great sacrifice. The fact is, as shown by the evidence of James Montgomery, president of the Railroad Company, and Thomas L. Smith, director and attorney, that but $80,000 00 of the $200,000 00 of bonds issued to the Company were pledged (see page 110, question and answer 30, and page 91, answer 4,) and that the balance $113,000 00 remained in the hands of the Railroad Company—seven having been previously sold—and that to redeem the eighty bonds pledged, the Company gave up, besides the eighty bonds pledged, one hundred and thirteen bonds of $1,000 00 each that were not pledged, and cancelled the city's subscription for $200,000 00 more, thus giving up $393,000 00 in bonds and subscriptions, payable upon demand in bonds, to prevent eighty bonds being sold; these bonds and the city subscription, at the time, constituting the whole available means of the company to pay its debts, as shown by the testimony of Smith and Montgomery, offered by the defendants.

These facts are undisputed, and, we think, clearly establish the charge of fraud in fact, and show that there was a design upon the part of the city and railroad officials to withdraw from the reach of creditors all the available means of the Railroad Company.

THE COMPROMISE CLEARLY FRAUDULENT IN LAW.

If no other objection existed to the compromise it is fraudulent in law as to the complainants, and therefore void.

The Railroad Company, at the time of the compromise, was embarrassed and unable to pay its debts without calling in its capital stock. The bonds and subscription of the city constituted a large part of its unpaid capital stock and nearly, if not all, its available means to pay its debts.

That such a compromise, made under such circumstances, is void, is well settled by repeated reported adjudications in this country and in England.

This compromise was not put by either party to it on the ground that the liability of the City was even doubtful. The first section of the compromise ordinance, (see page 87, printed record,) shows that the grounds of the compromise were, that the Company "*had suspended all work upon its railroad and had expended "all the cash and real estate which the Company had received for "stock, and the Railroad Company wished to compromise and de-"liver up the bonds of the City.*"

There is no intimation that the City claimed that its subscription made or bonds issued, were invalid. Indeed the contrary clearly appears, for the City defended the suits of Tellon and Briggs brought to enjoin the taxes assessed for railroad purposes, (see record 170th to 173d.)

The transaction was an attempt upon the part of the officers of an insolvent and failing corporation, which had expended all its cash and other subscriptions in a vain attempt to construct its railroad, and had no means to meet the demands of clamorous creditors, to release its principal debtor and stock subscriber from the payment of what was due to the Company without receiving the money due.

Repeated judicial decisions have settled the rule, that the officers of a moneyed corporation are trustees for the creditors, and that they cannot give away the assets of the corporation, release its debtors without payment, or do any other act prejudicial to its creditors. *That the capital stock of a moneyed corporation is a trust*

fund irrevocably pledged to the creditors of the corporation, and that such capital stock cannot be diminished or squandered under the name of dividends or otherwise. No court has more firmly adhered to this rule than this Court; see 15th Howard, 304; 22d do, 380. In the latter cause the Court used this language, "when "that portion of the capital, not paid in cash, is required to pay "the creditors of the company, the stockholders cannot be allow- "ed to refuse payment unless they show such an equity as would "entitle them to a preference over the creditors, if the capital had "been paid in cash."

The stockholders are, usually by the charter, relieved from personal liability, but the capital stock stands liable in their place; it is sacredly pledged and cannot be withdrawn, nor its payment withheld if not already paid in when it is necessary to be used to pay the debts of the corporation.

This rule is well settled; any other would render it unsafe to trust any corporation. Sec. 2d, Redf. on Railways 634; 1st do 168 to 170, and cases cited; Angell and Ames on Corp. 599 to 606; 27 Saw. and Eq. 572; 39 do. 576; 20th Conn. 178; 13th Wis. 57; 48 Penn. State 29; 46 do. 48; 16 Conn. 593; 2d Sandf. Ch. R. 257; 9th Paige 152.

We maintain then, to conclude this point, that the compromise set up is invalid because, *first*, the Common Council had no power to make it; *secondly*, the officers of the Railroad Company, under the circumstances, had no power to make it, and lastly, because it is fraudulent both in law and in fact.

This brings us to the consideration of the last defense set up by the City.

THE JUDGMENT IN THE LINDLEY CASE.

A brief statement of the facts will enable the Court to fully understand the nature of this defense. As we have already seen from the record of proceedings in the case of Victor A. Pepin *vs.* The N. A. and S. C J. Railroad Company and others, heard and decided by the Circuit Court of Floyd County, Indiana, on the 14th day of November, 1857, (see printed record, 33 to 62,) a judgment was rendered by that Court in favor of the holders of the one hundred and ten bonds secured by the mortgage upon certain real estate of said Company, described in the mortgage

says "*that all the matters and things stated in the answer of her "co-defendants, Pierson and Seymour and John P. Putnam, "Samuel J. Andrews* and others, are true." Here then is not only no denial of anything said or claimed by Putnam, Ely and others in respect to the Pepin judgment, *but an unqualified admission of the truth of every word stated in their answer.* And this is every word that is said by the complainants, the railroad company, or any one else in the Lindley case, from first to last, about the balance due, or about the judgment or decree in the Pepin case, except some general allegations by the other parties in respect to the validity of the decree because Lindley was not a party.

After the trial of the Lindley case, and while the Court held the case under advisement, Putnam, Ely and others, fearing that the Court might disregard the decree of foreclosure in the Pepin case, filed supplemental answers—not withdrawing their former answers—in which they said that they severally owned the bonds described in said mortgage, respectively owned by them, so that if the first decree was disregarded they would suffer as little as possible by such ruling, and some of them prayed the same relief prayed for by the plaintiff. These answers will be found on pages 165 and 166 of the record in this case; an examination of them will show that they were filed out of abundant caution to be in position to suffer as little as possible if their former defenses were overthrown. And that the Court and Railroad Company so regarded them is very clear from the fact that *the Railroad Company filed no reply thereto and took no issue thereon.* Indeed, as we have seen, the answers were filed *after all the evidence was offered and the case argued.* Hence there can be no truth in the pretended verbal agreement sworn to by Smith and Howk, as there was no evidence offered by any one *after* such supplemental answers were filed. See page 164, where it appears that the evidence was offered from the 16th to the 19th of December, 1867; the case argued Jan. 27th, 1868, and adjourned until the 18th of February, 1868, when the answers were filed and the case was finally decided.

But whether these supplemental answers were to be considered in or out at the time of trial can make little difference as *no issue was taken by any one upon them, and there is not one word in them from first to last about the Pepin decree or judgment,* or whether

it had been paid, discharged, or extinguished or not. Hence, what we have said before is fully and completely supported by the record, that there was *no issue in the Lindley case* between the complainants or those under whom they claim, and the Railroad Company, upon any fact; but that every allegation in respect to the decree and the balance due upon it was in that case by the Railroad Company solemnly admitted of record by its answer to be true.

There was not only no issue in regard to the payment or satisfaction of the decree rendered in the Pepin case, which we here seek to enforce, made in the Lindley case, but the fact of such payment or satisfaction was not so much as named or discussed on the trial, *not a word was said about it by witness*, party or attorney. See evidence of defendants, Smith, McDonald and Davis, on pages 182 to 184.

The complainants litigated nothing with the Railroad Company in the Lindley case. Their interests were indentical, and both acted together to defeat a new foreclosure of the mortgage.

The first word in the record in the Lindley case about the complainant's decree in the Pepin case having been paid or satisfied is in the decree made *after* this action was commenced. Nothing of this sort appeared in the *pleadings or evidence and nobody pretends that such was the fact.*

But this paragraph in the decree in the Lindley case, about payment and satisfaction of complainant's decree, not only is outside the issue, unsupported by any evidence, and false in fact, but is utterly inconsistent with all the other facts in the decree rendered in that case, and with the records in the Lindley and Pepin cases.

As we have already seen, the sole object and purpose of Lindley's complaint and suit was to procure a foreclosure of the mortgage to Pierson and Seymour, which had been previously foreclosed in the Pepin case; and *the only issue in the Lindley case was whether the foreclosure and sale in the Pepin case was valid.* The complainants, in this case, set up as a defense, in the Lindley case, the foreclosure proceedings in the Pepin case. Lindley denied the binding effect of that foreclosure as he was not a party, and the case was heard and decided upon that issue. The Court (see pages 166 to 168) found in the decree, here relied

upon as a bar, that on the 14th day of November, 1857, in the Pepin case, "a judgment was rendered and a recovery had *upon* "*the mortgage, described in the plaintiff's complaint, and each and* "*all of the bonds mentioned, and enumerated, in said mortgage,* "*that under said judgment all of the premises, described in said* "*mortgage, had been sold and conveyed, and such sales and con-* "*veyances approved and confirmed by the Court.*" Then follow the words relied upon here as a bar, "That by the agreement of "the parties to said judgment, who were then the holders of said "bonds, and the said Railroad Company, the said mortgaged "premises were received by them in full payment, satisfaction "and extinguishment of all claims and demands on said bonds "and mortgage, and of the said judgment so rendered thereon, as "aforesaid."

Whereupon the court finds that before Pepin commenced his suit, he pledged to said Lindley three of the bonds, of $1 000 00 each, as collateral security for a loan of money, and that there was a large amount due from Pepin to Lindley on said loan, and that Pepin had taken judgment on seventeen bonds, three of which were the bonds thus pledged to Lindley, and that, therefore, he was a trustee for Lindley for three-seventeenths of the land acquired by him by virtue of said foreclosure, and Lindley was thereupon allowed to *amend his complaint* so as to treat Pepin as his trustee for 3-17ths of the mortgaged premises set off to him, and a decree made that 3-17ths of the real estate so set off to Pepin, be sold, and the proceeds applied, first, to the costs of the Lindley case, and the balance to satisfy the amount found due from Pepin to Lindley, and as to all other parties the proceedings were dismissed.

This is the whole of the Lindley decree. The case was instituted to foreclose a mortgage; the court found that it had once been legally foreclosed, and hence it could not be foreclosed again, but found that the complainant, by amending his complaint, was entitled to certain other equitable relief, which, the complainant, having made the amendment, was duly decreed to him. But what had "the full payment and satisfaction of the judgment" in the Pepin case to do with the decree in the case? Was any such fact necessary to uphold the decree? Who had submitted to the court any such question? The question of a

prior foreclosure of the mortgage, and sale of the mortgaged premises was submitted, and he found, precisely in accordance with the answers of Putnam, Ely and others, that such mortgage had been foreclosed, and that the proceedings, including the sale, were all legal and valid. Having found these facts in accordance with the issues, and in affirmance of the judgment we here seek to enforce, the court proceeded to find, outside the issue, that the same lands were taken by the judgment creditors by agreement to receive them in full payment of their bonds, mortgage, and judgment rendered thereon. These findings are utterly inconsistent, the one with the other, and the latter outside the issues, and in conflict with the conceded facts in the answer of the railroad company.

In concluding this point, we submit, that it is indispensable to an estoppel by judgment or decree that the same identical question presented, should have been decided in the preceding case, that complainants in another action, should have demanded an enforcement of the same demand they here seek to enforce.

To constitute such an adjudication as will be an estoppel, there must be "*identity of the thing demanded; identity of the* "*cause of the demand*, and of the parties in the character in "which they are litigants, and the judgment must be on the "same subject matter, and for the same purpose." 24th How. 341—2.

"*It is not the recovery, but the matter* alleged by the party, and "upon which the recovery proceeds that creates the estoppel." 3rd East, 355.

"It is only where *the same question* has been determined, that "the former judgment is a bar;" 21st Ind. 153.

"Judgments are co-extensive only with the issue, and conclude "nothing not necessarily embraced therein," 31st Conn. 417,423, 12th do, 365—373.

"The former judgment is conclusive only as to the matter "which was directly in issue in the former trial. The points in "issue must be the same, and the judgment is conclusive only "upon the matter which was directly in issue in the previous "action. By matter in issue is meant that upon which the "plaintiff proceeds by his action, and which the defendant "controverts by his pleadings." 43rd N. H. 495, 6 Foster, 552.

"The test of identity of subject matter is, will the same "evidence support each action?" 7th John's, 20; 8th do 383; 6 Hill, 114 and 139; 2d Edwards, 417; 2d Phil. Ev. 16; 2d Abbott Nat. Dig. 554.

"Facts stated, or found by a court or judge, are not binding upon the parties unless embraced in the issue." 12 Conn. 417; 9 Cush. 348; 2 Gray, 399; 7 do. 499; 6 Pick. 147; 15th do. 276; 9 Cush. 255; 21 Ind. 151; 2 do. 269; 3 Day. 138; 8 Conn. 268; 25 New York, 613; 3 Wall. 704; 99 Mass. 493; 3 Sum. 20; 1 Storey, C. C. 474; 2d Wall. 35.

The case in 3d Wallace is in point. The court there say: That "the language of a decree in chancery must be construed "in reference to *the issue* which is put forward, by *the prayer for* "*relief and other pleadings.*" Speaking of the decree, the court says: "We think a decree having such an effect could not have "been properly rendered *upon the pleadings and issue* in that "case."

The rule is well settled by the foregoing cases, that to constitute an estoppel by judgment *the two actions must be identical.* The allegations and demand must be the same. That the parties are bound by what *they have alleged* rather than by what the court has said, in making the decision; and that parties are never bound by facts found, or remarks made by the court *unless such facts are in issue, and mentioned* as the basis of the judgment.

Applying these principles to the question here presented, it will be seen that the estoppel pleaded in this action is defective and insufficient for the reasons following:—*First*, The causes of action are not identical. The present action is predicated directly upon the decree or judgment of Nov. 14th, 1857, in the Pepin case, and is prosecuted for the sole purpose of collecting the balance due to complainants upon that judgment or decree. Nothing of the kind was attempted in the Lindley case. The Lindley action, in which the decree relied upon was rendered, was prosecuted for the sole purpose of foreclosing the mortgage to Pierson and Seymour, foreclosed in the Pepin case, and the complainants here, who were defendants there, set up the decree and proceedings in the Pepin case for the single purpose of protecting their title to the lands set off to them under such decree and proceed-

ings. So far as the complainants were concerned that case was one in which they had *no interest other than to defend the title to their lands acquired in the Pepin case*, and they neither sought nor demanded any affirmative relief of any kind against the Railroad Company, its stockholders or debtors.

Secondly—There was *no issue between the complainants and the Railroad Company in the Lindley case.* Their interests and pleadings were identical. The complainants here, who were defendants there, pleaded the former foreclosure as a defense to their land titles acquired under it. And the Railroad Company in its answer adopted the answer of the complainants as its own, and solemnly admitted of record that every word said by the complainants, about the judgment or decree in the Pepin case, was true.

Thirdly—In point of fact there was no question touching the payment or satisfaction of the judgment or decree, now sought to be collected, litigated in the Lindley case. The defendants, Smith, Davis and McDonald, all so swear, (see pages 182 to 184 printed record) and *no one* swears that any such question was *even named on the trial.*

Fourthly—No one pretends that *in fact* the holders of the bonds, or owners of the judgment of Nov. 14th, 1857, ever did agree to accept the bonds, described in the mortgage, in payment and satisfaction of such judgment. No witness swears that there is a word of truth in any such statement, and Ely, Smith, McDonald and Davis swear that such a proposition was not so much as even named to their knowledge.

The records of the Railroad Company fail to show any such compromise or proposition; *and the records in the Pepin case show that the lands were not so taken, but were taken at what they sold for at Master's sale, and execution was ordered to be, and was issued for the balance*, $85,319 00. (See printed record, p. 58.)

Fifth—No question of payment or satisfaction of such judgment or decree *could* have been made or litigated in the Lindley case, under the issues.

"Courts cannot, even by consent of the parties, pass upon "questions not raised by the pleadings." 14th Calif. 27.

"Evidence of payment, or satisfaction of a judgment, debt or "demand is not admissable under the general issue." 13th Ind.

63; 9th do., 273; 10th do., 407; 29th Barb., 170; 14th Ind., 528; 12th Iowa, 459; do., 563; 16th Ind., 206 and 341; 15th do., 365.

Sixth—The fact that the judgment was not paid, if at all material in the Lindley case, was conclusively settled by the pleadings; it being averred on one side and admitted on the other, no evidence will be received to show that a fact thus confessed was litigated; such evidence would contradict the record, showing that the case was heard on the issues joined.

—10th Ind., 302; do., 566; 9th do., 252; 4th Iowa, 587;—and

3 Pick., 434; 2 do., 20; 17 do., 7; 3 Wend., 27 to 55; 4 Ct., 276; 7 do., 377; 2 Johns, 24; 3 Wall, 709; 8 Wend., 45; 3 Comstock, 173; 9 Cush. 348.

Seventh—The facts relied upon as an estoppel do not constitute the basis of the judgment or decree rendered, are not necessary to uphold it, but are in conflict with the decree as actually rendered—see page 167 of record, where it appears that the whole decree is predicated upon the fact that Pepin acquired certain bonds by *virtue of the decree*—which we here seek to enforce. If the former adjucation, here relied upon, is to prevail, well settled rules must be disregarded, and the mere remark of a judge, in deciding a cause, having no reference to the issue, in conflict with the decree and the facts in issue found in the decree, wholly unsupported by testimony, false in fact, *in direct conflict with the admissions of record of the party pleading it, and outside of any issue in the cause*, must be taken as irrefragible truth.

If such a rule were to be adopted it would be dangerous to submit a cause to a court, the solemn admissions of an adversary, of record, and the entire absence of evidence and controversy, upon the trial, in regard to such fact, would be no protection against journal entries of the kind here relied upon.

But we will not trouble the Court further upon this point; we entertain no doubt as to the result of this defense; this Court has too often declared the law, here applicable, to leave us in any uncertainty as to the utter worthlessness of this defense. We will, in the further consideration of the case, take it for granted that the debt we seek to collect, by these proceedings, has not been paid or satisfied.

II—THE LIABILITY OF THOMAS L. SMITH AND OTHERS.

Assuming it to be true that the judgment of the complainants, here sought to be collected, is not to be considered cancelled and discharged by the decree in the Lindley cause, we will now consider the question as to the liability of Thomas L. Smith and his associates.

Upon this point there is no question in regard to their subscription as charged in the Bill. They admit, in their answer, the subscription, and the due organization of the Railroad Company.

The only question made by their answer is, that they have been discharged by reason of an assignment and transfer of their stock to the City of New Albany. They claim that this transfer and assignment was made under such circumstances as to release them from their original liability. The complainants deny that they have been released.

The burden of proving such release is upon the Defendants. As we have seen, the City claims it never subscribed for any stock in said Railroad Company, and this fact is insisted upon by the same attorneys who defend for Smith and his associates. In fact, Smith, himself, is one of the attorneys for the City and for the City he insists that the City never became a stock-holder in the Railroad Company, and for himself he insists that it did.

In order to maintain this defense it is necessary for the defendants to show, *first*, that the City legally subscribed to the stock of the Railroad Company; and, *secondly*, that they legally assigned their stock to the City.

If, as attorneys for the City, Smith and his associates succeed in showing that the City never became a subscriber to the stock of the Railroad Company, then their own liability is established, for in their answer they do not pretend that they had, or were to have, any right to assign or transfer their stock to the City, unless the City subscribed for stock to the amount of $50,000 or more. Hence, if they fail to show that the City became such subscriber, the sole condition on which their right to transfer depends, fails, and by their own showing they are liable. They

occupy a peculiar position in court, for, if the Court shall adopt their argument in behalf of the City, then the City never became a stock-holder, and they had no right to make the assignment to the City which they undertook to make; and, if the Court shall adopt their argument in behalf of themselves, then the City became a subscriber to the stock of the Railroad Company, and is now indebted therefor.

The defendants claim that the stock so assigned by them to the City became merged in the subscription of 8,000 shares made by the City, and that they received no consideration therefor, and "that said stock so made over by them to said City formed, "in fact, part of the identical stock so sold by said Railroad Com- "pany to said City, and that the same was, by these respondents, "made over directly to the City for mutual convenience and to "avoid the more troublesome process of surrendering, canceling "and reissuing the same."

The articles of association, subscribed by said defendants, the Court will find on page 28, and it contains the following provision relied upon by the defendants, to wit: "Provided, however, "and it is hereby understood, that if the City of New Albany, "in its corporate capacity, shall hereafter take stock in this cor- "poration to the amount of fifty thousand dollars or upwards, "inasmuch as the present subscribers, being residents of, and "owning property in said City, will then be under the necessity "of contributing still further to the objects of this corporation, "by way of taxation, unless a portion of the present subscription "is taken off their hands; the said City shall accept, in part, of "the amount to be subscribed in its corporate capacity, at its par "value, a transfer of any amount of stock now subscribed for by "each individual over and above the amount of six shares, or "three hundred dollars, which such individual may desire or "request shall be thus transferred."

"On page 29 is the resolution of the board of directors under "which it is claimed the assignment to the City was made. It "reads as follows: On motion, it was ordered that the original "subscribers to the articles of this company be permitted, in ac- "cordance with the stipulations contained in said articles, to "transfer any amount of the stock, so originally subscribed by "them, over and above the amount of six shares or three hundred "dollars, to the city of New Albany, said city having made a

"subscription to the stock of said Company to the amount of "fifty thousand dollars and upwards, and that said stock thus "transferred, be merged in the subscription, already made by said "city, so that the stock of said city, under her present subscrip- "tion, with the stock thus transferred, shall not exceed four "hundred thousand dollars as subscribed by her."

Under the above proviso and resolution, as claimed by the defendants, they did, immediately on the passage of such resolution, assign and transfer to the City all their stock except $300 each.

We claim that such pretended transfer and assignment did not release the defendants, for the following reasons: *First*, There is *no evidence* that any assignment, even in form, was made by any of them; what is said by the clerk under the name of "*Agreement of Record*," page 89, cannot be noticed by the Court. If any such agreement was in fact made, which we deny, it should have been in writing and signed, and not left to the vague memory of man. That the Court cannot notice such an entry is clear. See 5 Pet., 248 and 254; 10 do., 368; 13 do., 158 and 137; 15 do., 234; 24 How., 141; 3 Wheat., 101; 3 Cranch, C. C., 328; 2 How., 392; 20 do., 427; 10 do., 329; 18 do., 60; 16 Pet., 291.

Secondly, The facts set up in the answer do not show such an assignment as will release the subscribers. The proviso in the articles of association is void. Whether conditional subscriptions are valid or not after organization, it is well settled that all such conditions in the articles of association are void. See 48 Pa. State Rep., 29, especially 35 to 37; 1st Vol. Revised Statutes of Ind., 504, sec. 1 and 2.

Thirdly, The resolution passed by the board of directors permitting the peculiar transfer made, is void, for two reasons: *first*, because it was passed by a board of directors *for their own benefit. Every one of them were subscribers*, as shown by the exhibits to the answer, (see pages 28 and 29,) and no resolution passed by a board of directors in respect to any matter in which they are personally interested, is valid or binding. Sec. 1, Redfield on Railways, 583 and 585; 48 Pa. State, 29; 41 Barb., 353; Storey Agency, par. 210—42; 16 Curtiss' Sup. Ct. Decisions, 91; 17 Barb., 132; 20 do., 468.

And, *Secondly*, It is void as an attempt upon the part of the directors, not to allow a transfer of stock as claimed, but to allow

a *cancellation* of so much stock, a *nominal* transfer to the City, but a *real* blotting out of so much stock. A transfer that would relieve the directors, and their fellows, but that would not increase the stock of the transferee. Whatever name may be given such a transaction, its substance and effect, if permitted, would be to reduce the capital of the company and its means of paying its debts, and carrying out the objects of the corporation to the extent of the amount so transferred. The directors have no authority to thus dispose of the effects of the corporation. It is contrary to the Statute, 1 Gavin and Hord., 269, sect. 7; and contrary to the decisions of the courts, 48 Pa. State, 29; 27 L. and E., 572.

The whole transaction shows that there was no intention to transfer the stock to the City, and have the City receive it and pay for it.

The contrary plainly appears. In substance, the transaction is the same as if the directors had voted to release the subscribers from the performance of their obligations to pay for the stock subscribed. The Statute above referred to provides, that in order to complete an organization, at least one thousand dollars a mile, or fifty thousand dollars in all, must be subscribed before organization. This provision is directly annulled, if, as soon as an organization is effected, the directors may release all the subscribers. In this case, preparatory to organization, there was subscribed about $145,000; and, if the resolution above named is to prevail, it was immediately released down to $15,500; a sum $35,000 less than the minimum allowed by law.

Fourthly. The city never accepted the assignment alleged to have been made to it. There is not a particle of proof that the City had any knowledge of such assignments or ever assented to them.

Fifthly, The City had no power to subscribe for stock when these alleged assignments are said to have been made, and no assignment was made after the city had power to subscribe for stock.

There is no room for mistake as to what was intended by the directors, and suffered by them to be done, in the resolutions and assignments under consideration. The whole thing was intended to release the *directors and their associates,* who subscribed

stock in the organization of the Company. The transfer to the City was simulated and unreal, no stock, in reality, ever being assigned to, or accepted by, the City, and none of this stock ever having been paid for, or intended by any one to be paid for, by it. The transfer was unreal; the stock being *merged* in the $400,000 subscribed by the City, but so that when transferred the amount so held by the City should not exceed $400,000.

The subscribers were to assign the stock without paying for it, and the City was to receive it without paying for it, and without increasing the stock it already held.

Of course it is plain that the directors intended that the Railroad Company should get no money for such stock as might thus be assigned to the City, and that the City should get no stock, and be called upon to pay for none by reason of any such assignment.

Practically, how does such an assignment and transfer differ from a resolution of the directors, expunging the subscriptions and relieving the subscribers from payment.

Why take the trouble to assign to the City, to "merge," or get rid of it? Why not cancel it directly, squarely and manfully?

We think it clear that they could not thus release any stock-subscriber, *but very clear that they could not thus release themselves.*

We cannot conclude what we have to say upon this point more appropriately than by adopting the words of Judge Strong, in the case above cited, from 48 Pa. S. Rep., 29. In speaking of the duties of the directors under similar circumstances, he says:

"Their duties were to conduct its" — the railroad's — "affairs "to the furtherance of the ends for which the company was "created: *they had no power to destroy it, to give away its funds,* "*or deprive it of any means* to accomplish the full purpose for "which it was chartered. Directors of a railroad company *are* "*trustees* for all the stock-holders, and in a very just sense for "the Commonwealth. *It is an abuse of their trust wholly un-* "*authorized, and at war with the design of the charter, to single out* "*some of the stock-subscribers and release them from their liability.* "*No such authority in them has ever been recogdized. It is neither* "*supported by reason nor authority.*"

Such language from one who now occupies, so worthily, a seat in the highest tribunal of this country, is comforting and refreshing to stock-holders and creditors of railway corporations. It gives promise of the good time coming, when directors will be treated as the agents and trustees of the stock-holders only, and not the absolute owners and controllers of the property committed to their trust. See to same effect, 27 Law E. Repts., 572.

OBJECTIONS ANSWERED, AND MISCELLANEOUS POINTS.

It is insisted that a recovery should not be had in this case. *First*, because in the order of sale, there was no award of execution for the balance remaining due after the lands should be sold, and that no legal execution issued after the return of such order of sale.

There are several answers to this objection. The first is, that the complainants recovered a money judgment against the Railroad Company; (see page 40, printed record,) where, after reciting the amount due to each complainant, "each of said sums to be levied," &c., the entry proceeds, "It is now, therefore, finally "considered and decreed by the Court, that the said William S. "Pierson, Jr., and Harvey Seymour, as such trustees, and for the "use aforesaid, do recover of said company the sum of fifty-four "thousand eight hundred and fifty-five dollars and costs, each "of said sums to be levied and collected as aforesaid."

Secondly, After the sale of the real estate upon the judgment and decree, and the return of sale made by the special Master Commissioner, the Court approved the sale and ascertained the balance due to the creditors, and *awarded execution* for the balance of the judgment or decree. (See record, page 58.)

The case, it will be noted, was still pending in court, having been continued from the October term, 1857. (See record, page 53.)

Thereupon, on the 6th day of August, 1858, execution was issued to collect the balance due on said judgment, and the Sheriff levied upon and sold certain lands of the Company, thereon, applied the proceeds, and returned the writ December 1st, 1858, unsatisfied, no goods, chattels, lands or tenements found, from

which he could satisfy the same. (See record, pages 66 and 67.) And, finally, the Court in the Lindley case, found that a valid recovery was had on the bonds and mortgage, and that all of the mortgaged premises were sold thereunder, and the sales approved by the Court, thus again judicially recognizing the validity of said judgment. (See page 167 printed record.) A judgment thus so uniformly treated as valid where rendered, we do not suppose can here be questioned.

Another objection urged is, staleness; that this suit should have been commenced sooner. The record furnishes a complete answer to this objection. It appears, First, that the owners of the judgments, and the trustees, Pierson and Seymour, were all non-residents of Indiana, and that neither of them had any knowledge of the facts on which equitable relief is demanded, until a few days before the bill was filed. (See evidence of H. Ely, pages 83 and 84.) Secondly,—Smith and Kerr, up to a few weeks before the bill was filed, had charge of the business of the complainants, so far as these claims were concerned, and being stock-subscribers, claiming to be released as above, and also tax-payers in New Albany, they did not inform complainants of the true state of affairs, and hence they had no information until it was accidentally ascertained by one of the complainants, early in 1868, as shown by above evidence of H. Ely.

Smith and Kerr, now as parties and attorneys, are endeavoring to defeat a recovery here, upon the ground of staleness and delay, caused, in part, by their own omission to inform their clients of their rights—not an enviable position to be in as attorneys. But it is not true, under all the circumstances, that there has been great delay in bringing this suit. Efforts were made to collect the money by execution up to December, 1858. Early in 1861, the rebellion broke out, and for a time business seemed at a standstill. Early in 1863, Lindley filed his bill to foreclose, over again, the mortgage. The whole matter thus became involved in a complicated and protracted litigation, which lasted until the time this bill was filed. The result of that litigation was doubtful, and there was danger that the judgment, rendered in the Pepin case would be held for nothing as against Lindley, because he was not a party in the Pepin case, and this danger would naturally prevent new suits until its result was ascertained.

Finally, the bonds of the City, the interest of which is now sought to be subjected, will not fall due until 1874; and there was at no time interest enough due on them to pay the amount due on complainant's judgment, up to about the time this bill was filed. The statute of limitations of Indiana will not bar an action on these City bonds for more than twenty-four years yet; nor will it bar an action upon the subscription of Smith and the other defendants, for ten years yet. Under such circumstances we do not think the complainants open to the charge of unreasonable delay. They have not slept upon their rights, with knowledge of such rights; and, in reality, they have brought this action at as early a day as they could, with a prospect of certain success in getting the money their due.

Third Objection.—Another objection taken to a recovery against the City is, that the bill contains no averment of a ratification by the City, under the act of February 21st, 1855, of the subscription previously made; and it is assigned for error, that the complainants were allowed to prove such ratification on the trial.

If such an objection to the bill could ever have been made successfully, it should have been made by demurrer, before answer; but no such point was made in the demurrer filed; and the City, in its answer, having distinctly put the fact of ratification in issue, and averred that the subscription was never ratified by said City or its Common Council, pursuant to said act or otherwise, and that the same remained void, cured any defect in the bill in that respect, if any defect, in fact, existed. (See record, page 15.)

But no defect, in fact, existed in the bill. The complainants sought to reach the interest then due upon $193,000 of the bonds of the City, and the averments of the bill are full and complete for that purpose. (See pages 4 and 5 of record.)

It appears by the bill that one hundred of the bonds were issued by the City to the Railroad Company, on the first day of January, 1856, nearly a year after the passage of the act authorizing the City Council to ratify the subscription. The bill shows that the bonds will fall due in 1874; that the City, by some fraudulent arrangement, has procured possession of them, so that complainants cannot describe them better than is done in the bill; and the averment concludes with the words: "That said

"subscription, made by said City, for four hundred thousand "dollars of capital stock, was legal in all respects, and that said "bonds were legally issued in payment for the said railroad stock, "so subscribed for by said City, and by said subscription, said "city became a legal stock-holder in said Railroad Company to "the amount of $400,000."

We suppose it to be clear, that a party is never required to set out the *law* or the evidence, in his pleading; that it is sufficient to state the *facts* relied upon; that the Court will take notice of all general laws without their being pleaded, and if the facts are disputed, will hear the testimony to prove or disprove the facts stated.

It would be utterly inconsistent with the rules of this Court, requiring brevity in pleading, to state at length, the *manner* of making the subscription by the City. If the legislature had authorized, by general law, such subscriptions *in advance*, no averment that the subscription was made under such general law would be claimed to be necessary. Can it make any difference that such authority was granted *after* the subscription? The effect, in either case, was to render valid, to legalize, the subscription made by the City.

As a mere question of pleading, it is wholly immaterial whether the authority to subscribe *preceded* or *followed* the act of subscription.

To make a valid subscription, and issue valid bonds, such authority must exist. The averments are, that a valid subscription was made, and that the bonds were legally issued; hence, all is averred that is necessary, 24th Howard, 295. The act of issuing one hundred bonds, January 1st, 1856, to the Railroad Company, as averred on page 5 of record, is a sufficient averment of ratification; such fact is sufficient evidence of ratification. 5 Wall., 772; do., 194; Abbott's Digest Corp., 673; 3 Kansas, 104.

It will be borne in mind that creditors, seeking to reach assets of debtors, have not in their possession the means of describing accurately the indebtedness sought to be reached; such a bill is in the nature of an attachment, and the debtor is called upon to answer; 39 New York, 287.

As to the admission in evidence of the ordinance of ratification, on pages 65 and 66, the City cannot justly complain of that. It

was admissible to prove the issue distinctly made by the City, and we think just as clearly made by the bill. But it was admissible, also, because *both parties agreed that it should be admitted.* (See record, page 77.)

It is there stipulated that all ordinances of the City, in reference to, or upon, the subject of its subscription, &c., &c., may be used in evidence. And, finally, there was no exception taken to the admission of such evidence, on the hearing: the clerk's entry about an exception, on page 66 of the record, is no evidence that an exception was taken. Exceptions cannot be so taken.

It is also insisted, in support of the judgment, in the Lindley case, set up as an estoppel, that on the trial, there was a parol agreement, or understanding, that any evidence might be offered in that case which could have been offered, if payment of the bonds had been pleaded. Judge Howk swears that during the discussion, succeeding the filing of the supplemental answers, he stated that he desired to plead payment. (See page 115, answer to first question.) It is now claimed, in behalf of the City, that, under such a parol agreement or understanding, the issue was enlarged, and that, instead of the case being heard upon the issue joined, as shown by the record, it was tried under a contract, dispensing with pleadings.

The estoppel pleaded can draw but little support from this afterthought of counsel. The objections, in the record, to such an estoppel, are clear. *First*, it is not true in fact that such an agreement was made. *Secondly*, the record shows that the case was heard upon the issues joined. (See page 166 of record.)

The parol evidence offered to show a verbal understanding to enlarge the issue, would contradict this record, as it would show that the case was not heard upon "the issues joined," but upon an agreement to admit irrelevant and incompetent testimony under the issues joined. Whatever must appear of record, must be proved by the record, and parol evidence will not be received to contradict, vary or explain the record. 3 Pick., 434; 2 do., 20; 17 do., 7; 3 Wend., 27—35; 4 Ct., 276; 7 do., 377: 2 Johns., 24; 3 Wall., 709; 8 Wend., 45; 1 Greenleaf's Ev. Sect. 528; 3 Comstock, 173; 25 New York, 613; 9 Cush., 348; 2 Gray, 399; 2 do., 502; 16 La. An., 363. Such evidence, if admitted, contradicts the record, as it shows that the case was not heard upon the issue

joined, as the record recites, but upon a parol understanding in conflict with it. *Thirdly*, issues in Indiana can arise on the pleadings only, and the evidence offered must be confined to the issue. 2 Gavin & Hord, 195 and 207. *Fourthly*, no one but Judge Howk pretends that he desired to plead payment. But he did not represent the City of New Albany in that case; hence he could not plead payment for it. He represented Mary M. Fitch, David D. Cadwalader and Cassander Wier. (See page 115 of record.) These persons, as shown by their answers, set up different defences, and claimed different judgments; for instance, in the answer of James Montgomery, the President of the Railroad Company, filed by Judge Howk, it is averred that he owns six of these bonds, and that they are all unpaid, and judgment is demanded for $10,000 upon them, and the foreclosure of the mortgage. (See page 133, and page 134 of the record.) A similar answer was filed by Judge Howk on five bonds for Robert M. Wier.

For Cadwalader, on page 144, he files an answer, in which he adopts the answer of Pierson and Seymour, and defends possession and title to the part of the mortgaged premises held by Cadwalader under the judgment and sale in the Pepin case. These are the only answers that Judge Howk appears to have filed in the case, and while they are exceedingly varied and contradictory, there is nothing about payment in any of them; and payment of the bonds, or judgment, would be an exceedingly strange plea for any of them to make, under the circumstances. How could such a plea be entered by Montgomery or Wier, each of whom were claiming judgments on the same class of bonds, and claiming that they were unpaid?

Consistency is a jewel. But it would be hard to reconcile the various answers filed by Judge Howk with his evidence, that he desired to plead payment for some one whose name he fails to give, and it would be more difficult still to reconcile his evidence with the record, which shows that all the evidence offered was introduced from the 16th to the 19th of December, 1867, and that the case was then continued for argument to January 27th, 1868, and then continued for decision to February 18th, 1868, when the supplemental answers were filed and the case decided. How could such an agreement be made, as he swears to when *no evidence* was offered by any one after the answers were

filed, nor for about sixty days before? *No one pretends that the Railroad Company proposed to plead or prove payment.* Its President, Montgomery, was in court, demanding a new foreclosure of the mortgage, and claiming that the bonds held by him had not been paid, and Robert M. Weir, of Howk and Weir, with Judge Howk acting as his attorney, was claiming the same thing. Payment pleaded, and proved by these clients of Judge Howk, an hundred times, could not avail the railroad company in that case, as it not only did not plead or offer to plead payment, but actually, in its answer, admitted all that the complainants, in the answer, in that case, charged, about the balance due on the judgment, to be true. (See record, page 162 and 163.)

Fifthly:—But, whether heard on a parol agreement, or the issue actually joined, no one pretends that, on the trial of the Lindley case, any evidence was offered to show a payment of either the judgment or the bonds. Hence, whatever the fact may have been, about such an agreement, no one acted upon it. No one offered any evidence to prove payment, and Judge Smith, Davis and McDonald, all swear, that no such question arose on that trial.

Sixthly:—There clearly was no relief demanded by any one on the Pepin judgment, in the Lindley case, as it was only set up there as a *defense* or *protection* to the title to the lands acquired thereunder whatever affirmative relief was demanded there; was demanded on the bonds and mortgage. It is well settled that a failure to recover on the bonds and mortgage a second time, from any cause or any plea, would not invalidate a previous judgment rendered upon the same bonds. Even a good defense, previously existing to the bonds, could not be interposed against the judgment previously rendered thereon. 2 Cowan & Hills' notes, 3rd Ed., 20 to 25; 43 Barb., 315; 17 Mass., 394; 1 N. H., 33; 36 Alabama, 482; 1 do, 103; 11 do, 695; 9 Johns, 744 and 232; 13 do, 187; 2 Cowan, 428; 7 New York, 352.

It is clear, therefore, that the estoppel relied upon cannot be aided or supported by the parol evidence introduced, nor could any evidence, if introduced, of payment of the bonds avoid a previous judgment or decree thereon.

And it is equally clear that the witnesses who testify to a parol

understanding about the introduction of testimony, without issues, are mistaken, *as the evidence had all been introduced. and the case argued, several weeks before the supplemental answers were filed.* Hence, it is impossible that there could have been any parol agreement or understanding, in respect to the admission of evidence, at the time or after such supplemental answers were filed.

PART SECOND.

ANSWER TO THE ARGUMENT FOR THE CITY OF NEW ALBANY.

Since writing the foregoing brief we have been furnished with a copy of the argument of counsel for the City of New Albany.

Upon page thirteen of the argument for the City, *five* distinct grounds of reversal of the decree are insisted upon. We will notice each of these in their order.

FIRST.—It is argued that the Demurrer should have been sustained, because, 1st, the Court had no jurisdiction of the subject matter; 2d, that the bill made no case for equitable relief; and 3d, that the remedy, if complainants had any, was under the statutes of Indiana.

We have already anticipated the *first* ground of objection to the bill, to wit: that the Circuit Court had not jurisdiction of the subject of the action.

This precise point having been expressly decided by this Court in the 18th How. 253 to 263, and 21 How. 582, and acted upon without question, in the case of Ogilvie *vs.* Knox Insurance Co., reported first in 22d How. 380, and again in 2d Black. 539, and which case was appealed from the Circuit Court of Indiana, and was a creditor's bill predicated upon numerous judgments recovered in the State Circuit Court of Indiana. We had supposed the question of jurisdiction would not be further pressed upon the attention of the Court.

Long before either of these cases was decided it was a familiar principle of equity jurisprudence that a court of equity had jurisdiction to enforce not only its own decrees but the judgments and decrees of other courts. Storey's Equity Pleadings, Sec. 429

to 431; Mitford's Equity 95; Cooper's Equity 98 and 99. Hitherto it has not been supposed that a Court of Equity had no jurisdiction to enforce a judgment rendered in another court. Such jurisdiction has been exercised without question by all courts clothed with equity powers.

The cases cited by counsel upon this point have no bearing upon it and were all decided upon an entirely different state of facts.

The second ground of demurrer named, is, that the bill discloses no indebtedness of the City to the Railroad Company.

This ground of demurrer *is not true in fact;* nor is it so much as named as a ground of demure in the demurrer itself. A point not made in the Court below, could not be made for the first time here.

It is designed by this point to raise the question, whether the indebtedness of the city to the Railroad Company is sufficiently set forth in the bill. The Court will take notice of the rules now in force requiring brevity and succintness in pleading, and the omission of all unnecessary details. Considering this rule we did not suppose it to be necessary or even proper to set forth in the bill all the steps taken by the city to become a stockholder in the Railroad Company. It surely cannot be necessary in a bill, to recite all the preliminary steps, such as the petition, the number of subscribers, the act under which it was done, and the like. We have, however, set this out with considerable minuteness, as the Court will see by reference to pages 4 and 5 of printed record.

The only defect suggested, is that we did not aver distinctly the act of ratification of the subscription by the city. We do not see how this can be any more necessary than it is to aver that any other particular act was performed, which is necessary to the making of a legal subscription. The subscription would not be legal until ratified, but as the statute, allowing cities to ratify, was passed February 21st, 1855, and one hundred thousand dollars of the bonds, the interest of which we seek to reach, was issued January 1st, 1856, as averred in the bill, and such an issue of bonds would itself be a ratification, as has

frequently been decided, when no particular form or mode of ratification was prescribed by the legislature.

After reciting the subscriptions and the issuing of the $200,000 00 in bonds by the city, the time they will fall due, &c., &c., the bill (see page 5.) alleges "*that said subscription made by said "city for said four hundred thousand dollars of capital stock, was "legal in all respects, and that said bonds were legally issued in "payment for said Railroad Stock so subscribed for by said city,*" &c.

It is not easy to see the defect in the bill, that no indebtedness of the city to the Railroad Company is shown in the face of the bill, as urged by the counsel for the city. We think such indebtedness is clearly shown in the bill, and if it had been demurred to on that ground, the demurrer should have been overruled. But the city named no such ground of demurrer. It demurred only because of jurisdiction, and when it came to answer, *it put the fact of ratification distinctly in issue* (see page 15), and thereby cured any defect in the bill, if any existed. It did not stop there, it agreed "that all ordinances of the city "of New Albany enacted at any time, in reference to or upon "the subject of subscription aforesaid, may be used in evidence "herein, without further proof, &c." (See printed record 77.) After such averments in the bill, and answer, and such an agreement in respect to the testimony offered, we think it too late to talk about technical defects in the bill, even if they exist.

The next point urged is "*that the attempted ratification was not "in conformity with the enabling act.*" There is really nothing in this objection. The subscription originally made by the city, provided that the amount subscribed should be paid in the bonds of the city "*upon the call of said* (Railroad) *Company.*" (See page 64 printed record.)

The preamble to the ordinance of ratification recites, that the Board of Directors of the Railroad Company had passed an order that if the Common Council of the city would ratify the subscription made, that no more than $250,000 00 of the sum subscribed would be called for, until the Railroad should be completed a certain distance. Certain other facts are cited in the preamble, as constituting sufficient reasons why the Common Council should ratify the subscription, and then follows the

ordinance of ratification. "It is hereby ordained that said sub-"scription, made by Joseph A. Moffett, for eight thousand shares "of the capital stock of said Company, in the name and on the "behalf of the city, be and the same is hereby now ratified and "affirmed." (See pages 65 and 66 of record.)

This act of ratification is absolute and unconditional. The reasons which induced the Common Council to ratify the subscriptions, are immaterial, and need not be set out in the preamble, but if set out, the reasons do not make the ratification itself conditional, and the facts above mentioned, showing that the city uniformly treated its subscription as being $400,000 00, and voted upon stock to that amount, clearly show that such ratification was not intended by the Common Council to be conditional.

Undoubtedly the Common Council relied upon the resolution of the Board of Directors, that payment would not be demanded until a certain event, but it did not incorporate any such condition into its act of ratification, it ratified absolutely, giving the reasons simply, in the preamble, for such absolute ratification. But if it were true that the Common Council had incorporated some stipulations or conditions, beneficial to the city, such fact would not render the ratification invalid. See 13th Ind. 395.

In answer to the *third* reason alleged, why the demurrer should have been sustained, to wit: "*that under the law of Indiana, relating to corporations, an ordinary creditor's bill will not lie in such a case.*" (See city brief, page 23.) It is sufficient to say that the jurisdiction of the Circuit Court, and its authority to entertain such bills, does not, in the least, depend upon the statutes of Indiana. The Court was not created, nor its jurisdiction regulated by the Legislature of Indiana. The courts of the United States have jurisdiction in equity, derived from the Constitution and Laws of the Union, which is uniform throughout all the States. Robinson vs Campbell 3 Wheat. 213–221. Neves vs Scott 13 How. 268. Fitch vs Creighton 24 do 159. Noonan vs Lee 2 Black 499. 21 How. 583. 2 Summer 401.

A remedy at law, allowed by the local or state statutes, will not defeat the equity jurisdiction of the Federal Courts. U. S. vs Howland 4 Wheat 108. Such jurisdiction has been exercised by the U. S. Circuit Court in Indiana, in a case parallel to this,

affirmed in this Court. Ogilvie vs Knox Ins. Co. 22 Howard 380. 2 Black 539.

The Federal Courts may entertain a creditor's bill in virtue of their general equity jurisdiction. 6 McLean 16. 4th do 18. do 12 2. 568.

It is perhaps unnecessary to say here to this Court, that the jurisdiction of the Federal Courts does not, in the least, depend upon the local statutes of the States, but that it is derived from the Constitution and laws of the Union, and is not subject to be abridged, limited or abolished by state legislation. That such Courts possess as full jurisdiction in one state as in another, without regard to local statutes or the practice of local or state courts. It being the settled practice of the Courts of Chancery of England to entertain such bills, and of the Federal Courts exercising a similar jurisdiction, to entertain such bills and grant the proper equitable relief.

The plain and adequate remedy at law, that will defeat a creditor's bill in the United States Circuit Court, must be *such a remedy as may be enforced in such Court.* Clearly parties having the right to sue in equity, in the United States Courts, are not to be driven into the State Courts and compelled to adopt the remedy at law provided by the local statutes.

The second ground alleged for the reversal of the decree against the city is, that upon the facts disclosed by the answers and the evidence, complainants have no subsisting claim against the Railroad Company, and are precluded by the Lindley judgment.

The statement by counsel of the facts relied upon to sustain this point, covering some nine or ten pages of their brief, beginning on page 28, is full of imperfections and errors. The Court will find it necessary to consult the record to correct such statements. On page 29 of brief it is in substance denied that the judgments of complainants were *in personam*, and it is asserted that at the succeeding term, when the order was made for the issuing of execution to collect the balance of $85,319 00 the parties were not in Court, and therefore, the order was *coram non judice.* The record, p 49, shows the judgment to be *in personam.* And on p 53 the case was *continued* to the next term,

at which time the order for further execution was made. The judgment being *in personam* of course no such order was necessary.

On the same page it is asserted that the "second mortgage" was executed to Smith, Davis and others, as a *further security for the real estate bonds* held by them, of the same class held and upon which the judgments were recovered in the Lindley case, by the complainants. The fact is, that said "second mortgage" was not executed to secure the bonds named, *nor bonds of any kind* held by any one, but said mortgage was conditioned to be void, if the Railroad Company saved said Smith, Davis, McDonald and others harmless for having become liable to pay $2,200 00 each, upon the account of said Company. (See record p 178–9.) The mortgagees in this second mortgage, were all, or nearly all, directors of the Railroad Company, and the mortgage was made to them on the 27th day of October, 1857, only a few days before the rendition of the judgment in the Pepin case, in favor of themselves and the complainants. They each held, at the same time, as security for the same liability of $2,200 00, five of the real estate bonds of $1,000 00 each, upon which each recovered, in the Pepin case, a judgment against the Railroad Company for $5,875 00. (See p 49.) If the property embraced in the first and second mortgages was worth as much as counsel for the city now claim, it would seem that these honest(?) railroad directors took tolerably good care of themselves upon a liability of only $2,200 00. When it is considered that there were eight of these directors, and that the judgment rendered in their favor, on bonds thus held as indemnity, amounted in the aggregate to $47,000 00, and that they were liable in the aggregate for only $17,600 00, we can readily see why they might have a little consideration for the complainants, and enter into the contract with them which the Court will find on pp 74 to 76, by which they generously(?) stipulated that they should each receive $2,500 00 and interest, upon an indebtedness of but $2,200 00, before the complainants should receive anything from the property embraced in the second mortgage, and then, if anything remained, the complainants should receive each a like amount, in proportion to their judgments, and the balance should be divided *pro rata*. We suppose these honest, high-minded gentlemen, who swear so profusely to what they think Mr.

Ely must have known in regard to the affairs of the Railroad Company and city subscription, would also have us believe that when he entered into this contract he knew that the directors had taken judgment for $30,000 00 more than was due them, and with such knowledge he made a contract with them by which they were to receive their full per centage on such surplus of $30,000 00 from the sales of property embraced in the first mortgage, and absorb enough of the other property of the Company to give them each a clear profit of $300 00, or $2,400 00 in the aggregate, before himself and his associates would receive fifty per cent. of their honest debts from the same Company. This action of the directors, in taking care of themselves at the expense of the honest creditors of the Company, should teach us not to put too much faith in their memory or integrity, when they testify as to what Mr. Ely, or any of the other complainants, had knowledge of, when such contract was made. The testimony of Judge Smith, the principal witness in respect to the compromise and this agreement, the position of the real estate and the terms on which it was taken, &c., &c., is full of contradictions and inconsistencies. As for example, on p 103 ques. 7, he swears "that at the time of the partition Mr. Ely and all the other parties being present, it was a part of that agreement that *the property "should be taken at the prices affixed to schedule, marked No. 2, and "applied to the payment of their several judgments at those prices.*" This answer would seem to support the Counsel upon the point we are now considering, and tend to establish the fact that the judgment should have been credited with the amount fixed in the schedule, instead of the amount realized by the sheriff at public sale, *but as the Railroad Company was not a party* to this partition agreement, perhaps such an understanding among creditors would not amount to much so far as the Company is concerned, inasmuch as the Company would not be compelled to accept a less price than the land sold for at public sale. It is clear that it would not be entitled to the advance realized, without being a party to the agreement, and making the terms mutual. But we will see how Judge Smith sticks to this story. In answer to ques. 8, he repeats substantially the above answer, and adds "that the return of the commissioner (appointed to sell the real estate) was not regarded as a return of the value of the property sold, and says, he does not know whether

"there was any credit made upon the judgment or note, but it "was my understanding that the property was to be applied to "the payment of the judgment *at the prices fixed.* The value "of the property was to be credited upon the judgment but once, "*but that application was to be made* according to the terms of "the written contract under which the property was sold to "Pepin and Kerr." In that contract no price is fixed, yet he insists above, it was taken "at the prices fixed in schedule No. 2."

If the Court will turn to page 105, and read from question 15 to question 21 inclusive, it will be seen that the witness takes back nearly all he states above. In answer to question 18, "Will "you now say, upon reflection, that each party to that partition "was to take the property set off to him, and valued in the "schedule at the value therein fixed, and credit the Company "with the amount therein fixed upon their judgments?

He says, "*I don't think that I have said that the judgments were "to be credited with the amount of the property as specified in that "schedule,*" and goes on to add an explanation. The question is repeated to him, ques. 19, and he replies "*I don't say so and have not said so,*" yet he had said so most emphatically when he supposed such an answer would only injure the complainants, but when he discovered by question 15 that if his statement was correct there would be a balance of some $730 00 in his hands, which he might be compelled to account for to the creditors of the company, his memory began to come to him, and he began to back down.

If the judgments were to be credited with the schedule prices of the land used at the time of the partition, why was it not done at that time? And why was not the credit of amount made at master's sale stricken out if this story is true? No reason can be given.

It is upon such testimony as this that the counsel for the city insist the decree should be reversed, so that the amount due complainants may be cut down, and the judgments credited with the prices fixed in the schedule instead of the prices realized at master's sale.

As no one but Smith swears to any such understanding or agreement in regard to the price at which the lands were to be

credited to the Company, and as he finally backs out of all he has sworn to on that point and as the record (page 58) not only shows that the property was applied upon the judgments at the prices realized at public sale, but *that the Court recognized such application, and determined what amount remained due, after making such application, and found it to be* $85,319 00. (See page 58.) This point would seem to be clearly settled without reference to the testimony of Mr. Ely. But if the Court will refer to this evidence, (pages 83 to 85,) it will be seen that his statement is in precise accordance with the record. He swears, ques. 3, that he never entered into any agreement whatever with said Railroad Company; and in answer to ques. 4, that he never authorized any one to do so for him, and never so much as received or heard of any proposition from the Company, in respect to said real estate. In answer to the 6th and 7th questions he says that the real estate held by him was received as is shown by the public records, of Floyd County, Indiana, by Master's sale, and partition afterwards made. And that he never made nor authorized any one to make any agreement to receive or credit such real estate at any price other than that at which it sold for at public sale, and that it was to be credited on the judgment at that price precisely as it was credited.

In regard to the lands bid off by himself, embraced in the mortgage of indemnity executed to Smith, Davis and others, called the second mortgage, he says, (ques. 11, p. 48) "I am not "now, and never have been, under any obligation to pay anything "more than is expressed in said deed for said real estate. I took "said real estate by virtue of said deed, and in accordance with "the terms thereof. So far as the Railroad Company is concerned, "the deed and the records show the entire transaction between "us concerning said real estate."

If he was not to have the lands, so purchased, at the price he bid them off, at what price was he to have them?

Judge Smith in one of his depositions, (p. 73, ques. 4) in answer to the question, "Were you ever authorized by Heman Ely "and others, holders of the real estate bonds, to compromise or "settle with said Company, or take real estate or other property "in payment or satisfaction of such bonds or judgment?" says, "I never was authorized to make any such settlement for them, "and never did."

In another deposition of his (pp. 182–3) he states that he never was authorized to make any such compromise, and never heard of any such compromise, and never knew of any settlement between the bond holders and the Railroad Company, and that he was present during the trial of the Lindley case, and heard no such claim made by any one, and no such question.

John S. McDonald and John S. Davis, two other directors of the Railroad Company, (pp. 183–4) swear to the same thing.

We assert with a most full and complete knowledge of all that the record contains, that there is not in it, from one end to the other, any evidence that the complainants were to receive the real estate, in either mortgage, at any price except what it sold for at public sale. It does appear by the written contract, above mentioned, and otherwise, that they were anxious to get what they could on their debts, and that they regarded the Railroad Company insolvent. But they lived many miles away from New Albany, some of them in Massachusetts, some in Connecticut, and some in Ohio. As shown by the evidence of Mr. Ely, none of them, but himself, had any actual charge of the business, and he had no knowledge of the state of the stock of the Company. He first learned of the alleged compromise, by the city, from Mr. Burke, in February, 1868. (See record p. 84, ques. 9.) That no such compromise was made, and that the lands were credited, in fact, correctly upon the judgments is shown by the answer of the complainants, filed by Judge Smith, *upon his own knowledge*, without conferring with the complainants, as shown by his deposition (pp. 103, ques. 109.) On page 98, ques. 5, he says he filed such answers from his own knowledge of the facts.

The answer referred to will be found on pages 130 to 132, printed record. In that answer, pages 131–2, he states "that the whole "of the property mortgaged by said Railroad Company, to secure "the payment of said bonds and coupons, as stated in the plain- "tiff's complaint herein, was not worth *more than thirty-four* "*thousand dollars*, and was entirely insufficient to pay said "bonds, which were one hundred and ten in number, for one "thousand dollars each, with coupons attached thereto. These "respondents never received anything in payment of said Rail- "road Company on account of the decree rendered by said Court, "except the lands herein aforesaid described, and the balance of "said decree in their favor, respectively, remains wholly unpaid,

"and said Railroad Company is wholly insolvent and has no "property out of which said balance, or any part thereof, can be "made." This answer adopts the answer of Pierson and Seymour as a part thereof. The Railroad Company filed no answer in that case until November 10th, 1866, when it filed an answer *in which it adopted the answers of these complainants therein, and of Pierson and Seymour, as true, and made their answers a part of its own.* See pages 162–3.

In view of this uncontradicted testimony, and the admissions of record of the Railroad Company and Judge Smith, we think we may safely conclude that the complainants did not take the real estate described in either or both mortgages in full payment and satisfaction of their judgment, or upon any other terms or at any other price than that at which the property was bid off at public sale. If this question is to be considered an open one the evidence is all with complainants. But we hold it is not an open question, that the amount due complainants has been conclusively settled by the Master's report. When the Circuit Court found the general equities of this case with the complainants, that Court referred the case to a Master Commissioner to hear, and report the amount due to the complainants, severally, upon their judgments, &c. And thereupon the Master heard the questions submitted to him and made his report to the Court, finding the several amounts due to the complainants, as finally decreed by the Court. See pages 31 and 32. *To this report no exceptions were filed*, and thereupon the Court made the final decree in the case. Now we suppose it to be well settled that such a report is final and conclusive between the parties as to all matters embraced therein, until set aside upon exceptions properly taken thereto. If we are correct in this then the question as to the amount due, on complainant's judgment, has been finally settled and determined, and must remain as reported by the Master. But whether the testimony is to be considered, or the report of the Master, there is no doubt that the complainants are entitled to the several amounts from the Railroad Company, found due to them by the Circuit Court.

We have discussed the effect of the Lindley judgment in the first part of our brief, and do not intend to repeat here what we said there. But there are, however, some points made by Counsel for the City, that we do not think we should pass unnoticed.

The Counsel, page 33 of brief, speak of the multiplicity and complexity of the issues and pleadings in that case. An examination of the record will show that the pleadings and issues were not very numerous or complicated, for a case with so many parties and conflicting interests. But it will not be necessary for the Court to examine all the pleadings, in that case, to correctly determine the plea of former adjudication set up in this. *One thing is clear, that in none of the pleadings in that case, is here one word about a compromise, payment, settlement or extinguishment of the judgment of the complainants.* The first intimation upon that point, in the whole record, is in the judgment or decree, rendered in that case, drawn up by Counsel *after this action was commenced*, and entered in the absence of the complainants and their counsel, and without their knowledge. But as it has become a part of the record, in the Lindley case, we expect to be bound by it, so far as it is legally binding on us, and no farther.

The Counsel for the City, on page 34 of their brief, undertake to create a false impression in regard to the submission of the Lindley case to the Court, and to give the idea that such submission was *after* the filing of the supplemental answers of the complainants in that case. *The fact is that the submission to the Court was more than sixty days before the answers were filed.* The record, page 164, shows that the case was set down for hearing on the 16th of December, 1867, and that the parties, *on that day "submitted the cause to the Court for trial without a jury,"* and that the hearing continued for four days, and was continued to January 27th, 1868, *when it was argued by counsel*, and again continued to the 24th day of February for decision The record then shows, on pages 164–5, that the complainants filed certain papers, which Counsel call answers or supplemental answers. On the 18th day of February, 1868, *and on the same day the decision was entered on the journal, sixty days after the evidence in the case was closed.* No leave to file such papers, whatever they may be called, was given by the Court. There certainly could have been no hearing upon them. The record fails to show that any one took any issue upon, or notice of, them, or that the Court ruled in regard to them in any respect. No one excepted because they were filed. No one asked time to answer or reply thereto. And the fact plainly appears that they had nothing to do with

the hearing or decision of the case. *They were not on file when the evidence was offered or the case argued*, and if they had been, with no denials to them, they must have been taken as true. There was nothing in them on which a judgment could have been rendered. The answer of Judge Putnam will serve as a sample of all. After giving the names of the parties it proceeds, "John P. Putnam says that he is the owner and holder of six of "the bonds, issued by said Railroad Company, numbered 80, 52, "78, 50, 79 and 18, which are secured by mortgages, in the com- "plaint mentioned."

Not a word is said about their being due or unpaid, nor is any relief, of any kind, demanded upon them. Such a statement could not possibly change, add to, nor affect the issues previously made up and heard by the Court. It was filed without leave of Court, amounted to nothing, and neither Court, Counsel or parties appear to have taken the least notice of it. Such supplement statements or answers certainly give no aid to the estoppel relied upon here. How the paragraph relied upon as an estoppel found its way into the journal, whether at the instance of the Court, or of the Counsel for the City, who are parties defendant, we do not know, but certain it is that the statement is false in fact, that no such issue was tendered, no evidence offered to that effect, nor was it named on the trial, and it is utterly inconsistent with the conceded facts of record in the answer of the Railroad Company and in the case, and in no respect necessary to the judgment actually rendered. Considering that it was concocted since this suit was commenced in the Circuit Court, and taken in connection with the other conceded facts in the record, it plainly enough appears that such entry was, and is, fraudulent, and void for that reason, as well as because it has no relevancy to the issues or facts litigated in the Lindley case.

Courts of equity will not feel specially anxious to enforce such an estoppel, even if it was technically good, which this one clearly is not. The estoppel relied upon does not in terms, nor by necessary implication, cover either the bonds or judgments of the complainants. *None of the complainants, nor those under whom they claim, were parties in the Pepin case.* It is true that they were the owners of the bonds, and the judgments were rendered for their use and benefit, but they were not parties. The answer of the City (see page 18) states that none of them were

parties, and the record shows the same fact also. (See pages 34, &c.) The statement made in the journal entry, or finding of facts by the Court is, "that by the agreement of the *parties to* "*said judgment, who were then the holders of said bonds*, and the "Railroad Company, the said mortgaged premises were received "by them in full payment, satisfaction and extinguishment of all "claims and demands on said bonds and mortgage and the judg- "ment rendered thereon." Now it certainly canno tbe affirmed of the complainants, or those under whom they claim, that they were "*parties* to the (Pepin) judgment." It may be that all the *parties* to that judgment or suit did make the agreement recited in the journal entry, but that constitutes no reason for saying that the complainants, and those whom they represent, *who were not parties*, made such an agreement. The journal entry does not read that all the holders of bonds, secured by the mortgage, so agreed, but "*that the parties who were then the holders* of "bonds so agreed." This would include Smith, Davis, Pepin and the directors and officers of the Railroad generally, but would not include the complainants, or any one under whom they claim. If it is insisted that this is a technical construction of the words of the journal entry it is a sufficient answer to say that the defense itself is a technical and unjust one, a defense not to be favored. If any such arrangement had ever been made with the complainants, or those they represent, some officer of the Railroad Company, or Mr. Ely, who represented the bondholders, the complainants now claim under, would have known it. The books of the Railroad Company, all of which are still in possession of the defendants, would show it, as they show the attempted compromise with the City. For such a defense, apparently, and, as we have no doubt, in reality, concocted for this occasion, any legal answer, however technical, is sufficient. But we are not driven to a technical answer to this defense. It is neither good at law nor in equity. It was conceived in fraud, but the skill of its inventors was not sufficient to the emergency, and hence it can do them no good, and complainants no harm.

Counsel for the City devote much space to the effect of trying a case without an issue. A moment's attention to the record will show the state of the pleading so far as the Railroad Company and the complainants are concerned, and that is all we need now to examine. The complaint by Lindley (pages 119

and 120,) is in the ordinary form of a complaint to foreclose a mortgage. The answer of Pierson and Seymour and the complainants (pages 129 to 132,) set up the former foreclosure in the Pepin case, and the balance due to the complainants on the judgments as above, without naming what that balance was or claiming any relief upon account thereof, and the Railroad Company as we have seen filed no answer adopting the answers of Pierson and Seymour as its own and alleging that all the statements therein contained were true. (See pages 162—3.) Upon this state of pleading, plain and simple so far as the Railroad Company and complainants were concerned, the case was heard and decided. No question of payment or compromise was discussed or agitated during the trial, none was mentioned or alleged in the pleadings, none was ever, in fact, named or made between the parties. No such thing was ever heard of until after the case had been *heard and argued, and this action had been commenced, and it had become necessary to invent some defense*, then for the first time out of place and as if by stealth the paragraph relied upon is incorporated into the decree in the Lindley case. Does it need argument in this presence and before this tribunal to show that parties are not to be defeated in the collection of an honest debt of over $70,000 00 by such a device as that? Estoppels are not favorites of the law, and are not to be multiplied. No court has ever, to our knowledge, held that a person should be estopped by judgment until he had had a day in court, and had an opportunity, at least, of recovering or defending in respect to the same subject matter.

So far then as the issues were made up, and as the case stood up to the time the trial commenced, there can be little doubt there was no issue to which the statement in the decree can apply. Does the verbal testimony of Smith, Howk and others aid the estoppel? We think not.

As we have seen the trial of the Lindley case commenced on the 16th day of December, and continued until the 19th, when it was continued to January 27th, 1868, and was then "*argued by counsel*," and continued to February 14th, 1868, for decision, and on the 18*th day of February* the supplemental answers of the complainants, concerning which it is alleged the parol agreement was made, were filed. Now, how can it be possible that any such agreement was made as counsel speak of? *The case*

was argued January 27th, and continued for decision, and on the *same day* the answers were filed, the decision was rendered, all the evidence offered in the case having been offered in December, two months previous. It thus appears that it was impossible that any such agreement or understanding was had upon that trial, as counsel insist upon, and as Judges Howk and Smith think they remember. It is simply impossible that any agreement should have been made *February 18th*, 1868, under which evidence was, or was to be, introduced in the December preceding. The evidence was all in, and the case argued weeks before such answers were filed.

It is unfortunate for these witnesses that the dates are against them, and show that the statements made by them are utterly without foundation.

It is hardly necessary to say that this parol evidence as to an understanding during the trial, is not admissible.

Estoppels of record are not to be established by parol evidence. Under certain issues, wherein certain facts might, or might not, have been litigated, parol evidence has been admitted, to show whether a claim was, or was not, litigated in fact; but no case can be found to show that such evidence is admissible to *enlarge and change the issue itself*. The *issue* must remain fixed and certain by the record, but as certain facts may, or may not, have been litigated under certain issues, parol evidence, in proper cases, has sometimes been admitted to show that such facts as were *consistent* with the issues of record, were, or were not, litigated. But such evidence is always confined to showing what, *in fact*, *was* litigated, instead of, as in this case, what was *agreed* to be litigated. (See 5th Wall, 592.)

The parol evidence offered, therefore, should have shown that, in fact, upon the Lindley trial the parties introduced evidence touching the payment compromise, or extinguishment of the bonds and judgment. But no such evidence was offered because such was not the fact. There were so many persons present during that trial who could swear to the contrary, that even Judge Smith is compelled to swear that no such evidence was offered, and no such question arose during that trial. John S. Davis, another defendant, swears to the same thing. (Page 115, ques. 1.)

The numerous cases referred to by counsel, in their long argument upon this point, we presume were correctly decided upon the facts involved, but none of them have the least application to the question here presented.

The prevailing idea of the decision of the Lindley case was not, as counsel seem to suppose, the fact that the bonds or judgments had been paid off, settled, or compromised, but that the mortgage, having once been foreclosed, it could not be foreclosed again. The decree was predicated on this fact alone.

The authorities cited by us, in the first part of our brief, are all that we need call the attention of the Court to upon this point, if, indeed, the Court, upon such a state of facts, shall take the trouble to look at any authorities.

The *third* ground alleged for a reversal of the decree is that the City of New Albany is not indebted to the Railroad Company; that the compromise between the City and the Railroad Company is valid.

We do not propose here to add much to what we have said in the first part of our brief upon this point. We desire to correct counsel for the City in their statement of the facts. On page 50 of brief for the City, it is stated that the Railroad Company borrowed money from the Ohio Insurance Company, "*pledging all its City bonds as collateral security.*" This is a gross error. There were but *eighty bonds* pledged. See deposition of James Montgomery, one of the defendants, page 110 printed record, question and answer 30. Judge Smith, (page 91 record, question 4,) states that there was deposited from 80 to 100 of these bonds with the Ohio Insurance Company, as collateral security. This is all the evidence there is on that point. Hence it is clear that but 80 bonds were pledged at the time of the compromise. Of the others 7 had been sold, and 113, with their coupons, remained in the hands of the Railroad Company.

It is not true that there was any danger of any of said bonds being sold except the 80 so pledged, which would have left 113 still, in the bonds of the City, in the hands of the Railroad Company, and $200,000 in the form of a City subscription, with which to pay the debts of the Company, which debts, so far as appears, were all held by the complainants; all, or nearly all of the other bond-holders holding their bonds simply as collateral

security, upon small debts, which were nearly or quite paid off by the sale of the real estate.

It is also asserted by Counsel that the lands embraced in the two mortgages were so clearly good security for the bonded debt of $110,000 00 and interest, that no one seemed to doubt it, and the high appraisal of the property at $154,855 00 by certain persons, made to induce a sale of the bonds, is cited to show that this statement is true. A very plain statement of facts shall put this illusion aside. The eight directors who had become liable for $2,200 00 each, held each five of these bonds, on which there was due $5,875 00, or $47,000 00 in the aggregate, holding thus nearly three dollars in bonds for one of liability, and yet so fearful were they of loss that on the 20th of October, 1857, they executed to themselves a mortgage of further indemnity upon nearly all the remaining lands of the Company. Why did they do this if no one doubted the security?

When Counsel for the City want to show that the compromise was fair they say the real estate bonds were so well secured that no one doubted the security. But when they want to show that we purchased the bonds cheap they say, on page 62 of their brief, that at the time of the compromise they sold at from 20 to 30 cents on the dollar. Why sell at that price if no one doubted the security? The complainants took the bonds from the contractors, the Howards, as shown by the pleadings in the Pepin case and Montgomery's deposition.

It is asserted that in making this compromise there was no thought of hindering or delaying any one. What did they think of then? These same directors surely knew that the security to pay the bonds was wholly inadequate or they would not have made such haste to further indemnify themselves, notwithstanding the large quantity of bonds they held.

It is very clear that they intended to take care of the City, whether complainants, who were non-residents, suffered or not, and that such compromise and adjustment was not made, in any sense, in good faith. That this compromise and surrender of the City bonds and subscription was wholly unauthorized and fraudulent we think is very clear.

The *fourth*, and last, ground relied upon for a reversal of the decree is that complainants have slept upon their rights, that their laches alone would bar any claim for equitable relief.

The facts again are distorted to aid this new assignment of error.

That the judgment is not barred by any statute of limitations is clear. Judgments in Indiana are not barred under twenty years. (See 2 Gavin & Hord. 158–9. It is not stale or dormant as execution may issue without the order of the Court, at any time within ten years. (See Laws of Indiana of 1867, page 101.) The judgment then being in full life so that an execution could issue on it at the time that the bill was filed, it is clear there is no ground for the allegation of staleness as to it.

The Railroad Company in the Lindley case (see page 162 of record) on *the 10th day of November*, 1866, *fourteen months before complainants filed this bill* admitted in its answer that the judgments were due and unpaid, and its insolvency was the only reason why they were not paid. If the balance remaining after the sale of the lands was due and unpaid in 1866, when did the company finally pay them?

If any staleness exists it must be in the indebtedness of the City to the Railroad Company; but as the City bonds, we seek to reach, will not fall due until January, 1874, it would be hard to predicate staleness of them. The complainants surely were not bound to bring their bill until there was some money due on the bonds or on the interest. It is very clear that if there had been no attempt at fraud, no fraudulent compromise or adjustment between the City and the Railroad Company that no laches could be imputed to the complainants. Are the complainants to be adjudged guilty of such laches as will forfeit their debt s because the defendants are guilty of fraud?

Was it ever heard before that the fraud of the defendants would shorten the time within which the complainants may obtain equitable relief? That the defendants are in a better position now, and the complainants in a worse one, because of the fraudulent conduct of the defendants? Such a proposition would be monstrous. If the City and Railroad authorities had made no attempt at a compromise, the complainants had the right to lie quietly by until the bonds fell due, or enough interest accumulated to pay their debts, and then insist upon the application. If the City and Railroad officials had done nothing to interfere with their rights they could clearly have adopted

this course. Are they now to be defeated, not because of their own delay but because of the unwarrantable conduct of the defendants?

It will be borne in mind that at no time earlier than the bill was filed could it have been filed with any prospect of finding the money to make payment. There were but $193,000 in bonds in the hands of the Railroad Company, the $200,000 subscription drew no interest until the bonds were called for. The interest on $193,000 is $11,580 a year. The debt for which the 80 bonds were pledged would first have to be paid from their proceeds. Suppose it to be $35,000, as stated in their answer, there was due to complainants, say $42,500, and interest from March 30th, 1858, that would make a total debt of $78,500, to be paid off from an annual income of $11,580, the interest on which is $4,710, deducted from $11,580 would leave but $6,870 to apply on the principal, and it would take more than eleven years for enough to accumulate to liquidate the amount due to complainants and the Insurance Company. The suit was brought in about nine years, hence no delay can be charged on that ground.

But when it is considered that Mr. Ely was the only one of the complainants who ever visited New Albany in connection with this business until late in November, 1867, when Mr. Burke visited the place for the first time, after he had become a large owner of the debts; that neither Mr. Ely nor any other creditor under whom complainants claim, ever knew about the alleged compromise until Mr. Burke, during the trial of the Lindley case, accidently learned the fact. That Judge Smith and his partner, M. C. Kerr, who assumed to represent complainants in the Lindley case, were both personally interested in keeping such knowledge from the complainants, and did keep it from them; that all the material facts in regard to the compromise, and other matters connected with the case, are matters of record and easily susceptible of proof; that there was no delay in bringing the suit after knowledge of the facts; that during the greater part of the time the Lindley case, involving the legality of the first judgment and foreclosure was pending in court, and that before the Lindley suit was commenced, all business was neglected, on account of the great war in which we were engaged;

we think the defendants entitled to but little consideration, on account of the delay in bringing suit.

In regard to the purchases made by Mr. Burke, little need be said. He paid for the debts, &c., purchased by him, $7,300 cash, instead of $5,500, there being a mistake in the printed record, in regard to what he testified to on that point. He also took the property and debts as they were, involved in litigation, and burdened with taxes; and besides money, paid other valuable considerations for the property. The real estate acquired by his purchase was not worth $10,867 50, as claimed by counsel nor to exceed $6,000, and the title was in great doubt. It clearly appears that he had no personal knowledge of the property when he bought his interest, and that so far from knowing of the alleged compromise then, he first found it out several weeks afterwards. But all this is of little consequence. The owners had the right to sell, and he to buy whatever interest they had. Such sale changed none of the defendants' rights. If liable before, they still remain so. If not liable before, his purchase would not make them liable. We may, therefore, dismiss the suggestions in regard to such purchase in the further consideration of the case.

Our attention has been called by counsel to a statute of Indiana, 2 G. & H., 156; providing that actions for relief against frauds shall be commenced within six years. What this statute has to do with this case we are utterly unable to conceive. The statute referred to contemplates a case where one man has perpetrated a fraud upon another, for which the defrauded party has a right to bring an action, and provides a limit within which such an action is to be brought. But what has that to do with an action like this, prosecuted not because of any fraud, but because of an indebtedness of the City to the Railroad Company?

The basis of recovery in the case contemplated by the statute is the fraud perpetrated. The basis of a recovery in this case is the indebtedness of the City to the Railroad Company upon its bonds issued. The fraud alleged is not alleged as a basis, or ground of recovery, but as a reason why the City should not be relieved from the payment of its debts.

The complainants here set up that the City is indebted to the Railroad Company, upon certain bonds and coupons, to the amount of more than $200,000. The City sets up, in its answer,

an arrangement or compromise made, by which it has been discharged from the payment of that debt, and hence that it owes nothing. The complainants reply, you are not discharged by reason of such compromise,—*First*, because neither you nor the party with whom you made it had any power to release you without payment of the debt. And, *Secondly*, you were both guilty of fraud in attempting to make such a compromise and adjustment, and therefore you are still bound to perform your promise. What difference does it make, in such a case, whether the attempt to get released from the payment and performance of the obligation was one or ten years ago? In neither case could a party be released from performance, under such circumstances. And the statute above referred to would not aid him, nor in any way affect the question. It was intended to regulate an entirely different class of actions.

The fraud alleged in the bill, in respect to this alleged compromise, is not stated for the purpose of setting up a cause of action, or adding any thing to the cause of action alleged. The bill would be good without any such allegations. Such statements are introduced for two purposes: *First*, to excuse a more full and complete description of the indebtedness of the City, and, *Secondly*, in anticipation of the defense to be set up by the City, as may be done under the rules of this Court. The construction of the statute insisted upon by counsel for the City, involves this gross absurdity, that if fraud was not alleged the statute of limitations would not be applicable, but inasmuch as it is alleged the debt is barred by the statute. It comes to this: if no fraud had been attempted by the defendants, the complainants would not be barred by any statute of limitations, and could recover; but as an actual fraud was perpetrated, they are to be defeated by the statute. And thus the doctrine is contended for, that the statute of limitations applicable to written contracts is to be ignored, and the party's rights cut off long before they would be under such statutes, in consequence of the fraud of the defendants. In view of the statute barring such claims only in twenty years after due, which, in this case, would be 1894, such a proposition is simply nonsensical.

This attempted compromise was not good, even between the parties. It was a fraud upon the stock-holders as well as creditors, and made without power upon the part of those assuming to

make it, to bind any one. It was therefore a nullity, and is entitled to no consideration in the case.

Much is said in regard to the other real estate bond-holders considering their debts satisfied, or that they would get nothing more. The evidence fails to disclose the name of any one that had satisfied and discharged his judgment, or that intended to do so. Still, as most of them held judgments for $5,875 upon an indebtedness of but $2,200, they could better afford to do so than complainants could, whose debts amounted to the whole face of their judgments. They were much nearer paid than the complainants.

The cases cited and commented on by counsel under this head are undoubtedly good authority upon questions involving the same facts, but they belong to a class of cases differing entirely from the case at bar. The following cases are believed to be strictly applicable upon this point. 21 Md., 338. 3 Grant, 114. 12 Mich., 445. 28 Ill., 44. 13 Gratt, 354. 1 Beasley, 423. 1 Stockl, 425. 20 Miss. (5 Bennett,) 89 and 155.

The objection of want of parties is not well taken. If any such defect existed it should have been taken by *plea or answer*, *it is too late to urge it for the first time at the hearing*, and *a fortiori* after the hearing and upon appeal.

Storey *vs.* Livingston, 13 Pet., 359.
Segle *vs.* Thomas, 3 Bl. C. C., 11.
Tobin *vs.* Walkinshow, 1 McA., 26.

But there is no defect of parties. It does not appear that there are any other creditors of the Railroad Company, nor any other stock subscribers who have not paid their subscriptions, and if it did so appear this is not a bill to settle up the affairs of the Railroad Company, but to collect the amount due to the complainants on their judgments, for such a purpose the question of parties has been decided by this Court in Ogilvie, vs Knox Ins. Co., 22; How, 380; 1 Bl. C. C., 232; 3 McLean, 580.

The City (see brief page 25 and 68 to 70) insists that S. and C. Howard, who are not here parties, were stock subscribers to a large amount, and that they should have been made parties, and that the other persons who recovered judgments in the Pepin case should also have been made complainants. In regard to the Howards being made defendants, because stock subscribers,

little need be said. It is perhaps a sufficient answer to this suggestion to say *that the fact that they are stock subscribers is not stated in the bill, nor either of the answers or pleadings in the case.* No such issue was made. Nor is it proved that they were indebted upon any stock subscription, whatever. James Montgomery in his testimony, on pages 108 to 110 of record, states something about a subscription made by them, but he testifies that it was conditional, and was to apply on work, that the work and contract and subscription were all abandoned because the company could not comply. And all he pretends to state about it he states from the books, and the books were not offered in evidence, hence there was no legal evidence before the Court on the subject.

In regard to the necessity of making Davis, Smith, Pepin and others joint complainants, because they also recovered judgments in the Pepin case, it is sufficient to say that it does not appear from the bill or any other pleading in this case, that any balance remains due to either of them upon their judgments. Their judgments were all taken in their own names, without the intervention of a trustee, and were several and not joint. There is nothing to show that such judgments have not been fully paid and settled. It appears also that nearly if not all of them are residents of Indiana, and those made defendants make no claim that any balance remains due to them. It appears also from their evidence that their judgments were taken for amounts greatly in excess of the several amounts their due. That the real indebtedness of the company to such of them as were directors, which included Pepin, Davis, Smith, McDonald, Wier, Montgomery, Lent and Applegate, was only $2,200 each, except to Pepin, who held a few of the bonds he received from Howard. And it distinctly appears from the record (see page 177 to 181 inclusive) that Pepin, Smith, Davis, Montgomery, Wier, Lent, Applegate and McDonald each recovered judgments for the sum of $1,800, at the April Term, 1868, of the Floyd Circuit Court. That such judgments were recovered upon what is known as the second mortgage, *and upon the same indebtedness to each of them, upon which they held the bonds as collateral security, on which their judgments were taken in the Pepin case at the November Term preceding* (see evidence of Judge Smith, page 104, ques. 11 to 14, and page 98, ques. 7). It further appears by this record

that the real estate embraced in this "second mortgage" was ordered to be sold and the proceeds applied upon the judgments so rendered, and that execution issue to collect the balance due to the said several parties, after applying the proceeds of the real estate described in said mortgage. The amounts so found due to each of said parties was thus ascertained by the Court, and judgments rendered therefor, and there is no pretense that these judgments have not been fully paid, and whether fully paid or not the indebtedness of the Railroad Company to them, and upon account of which they had been allowed to recover judgments, November 14th, 1857, in the Pepin case, became merged in such new judgments of May 13th, 1858, and such new judgments constituted the sole evidence of the indebtedness of said Railroad Company to said parties, and each of them. In view of these facts there is little excuse for saying that those judgment creditors should have been made complainants in this case. They have little right to stand in that position until they show that something remains due them on these new judgments, which no one pretends. But if these several persons were in reality judgment creditors, and entitled to enforce the several judgments standing in their names, recovered November 14th, 1857, in the Pepin case, there is no necessity of making them parties, either as complainants or defendants. A creditor is not required to state in his bill that there are no other creditors, nor make them all parties, if any there are. Different creditors of the same judgment debtor *may* unite in a bill for equitable relief of the same nature, but it was never heard of that they *must* unite.

It is a little out of order, at this point, but we cannot refrain from calling the attention of the Court here to the record evidence furnished by the recovery of the above judgments of $1,800 each, May 13th, 1858; of the utter falsity and fraud of the claim that the complainants and other judgment creditors, in the Pepin case, received the lands described in the first mortgage in full payment of the judgments so recovered. If that were true how did it happen that Smith, Davis, Montgomery and other directors and officers of the Railroad Company, after applying upon the $2,200 and interest, each assumed for the company the pro-

ceeds of the sales of the lands embraced in the first mortgage, March 30th, 1858, (see record page 58) went on to recover judgments for $1,800 each for the balance remaining due them?

If they had satisfied their indebtedness and taken the lands embraced in the first mortgage, in full payment of their judgments in the Pepin case, as they make the journal read in the Lindley case, and now here insist, how can these honest officers and directors account for taking the second judgments, which show that the whole indebtedness to each of them was never but $2,266, and that after applying the proceeds of the lands, embraced in the first mortgage, there still remained due to them $1,800 each? We think upon the facts disclosed by this record the Court will be able to do justice in this case without requiring the complainants to go back and join Smith, Davis and others as complainants. Their position as defendants may be embarrassing to them, but it is, considering the relation they have borne to this whole transaction, a much more consistent one than to be complainants. We will leave them where they are. We wish to conclude this point of defect of parties, either as creditors or stockholders, by calling the attention of the Court to the fact *that it does not appear by the bill, or answers, or evidence, in this case, that there is one dollar of stock due from any person to the Railroad Company except the defendants in this case, or that the Railroad Company owes any person one dollar except the complainants.* And if it did so appear it clearly appears that there is enough due from the defendants to pay all the debts of the company and leave a large surplus, so that no injustice can possibly be done to any one by a decree that complainants shall be paid in full. And as this is not a bill to settle up the affairs of the corporation, but to collect the amount due the complainants, all necessary parties are before the Court. See Wood *vs.* Dunmer; 3 Mason, 308; and Ogilvie *vs.* Knox Ins. Co., 22; How, 380.

From a full examination of the case it seems to us clear that the decree against the City should be affirmed, and reversed as to Smith and his associates. Notwithstanding the record is somewhat voluminous, the facts are substantially all shown by the records in evidence. We think it clear that every allegation in the bill is fully sustained by record testimony. It appears by the record,

First, That the complainants recovered judgments *in perso-*

nam, against the Railroad Company, November 14th, 1857, for $54,855 and costs. (See record, 49.)

Second, That under such judgment and orders the real estate described in the mortgage was sold and applied upon the judgments, and the Court ascertained the balance due after the application, to be $85,319 and costs (See record, 58.)

Third, On the 6th day of August, 1858, execution was issued against said Railroad Company, and levied on certain real estate, which being sold for a few dollars, was returned on the first of December, 1858, *nulla bona*.

Fourth, That the Railroad Company was insolvent from some time in 1857 up to the present time, and that the City had full notice of such insolvency. (See answer of City and record, 81 and 82.)

Fifth, That the City subscription, when ratified, became legal and binding. Such subscription and ratification are clearly proved by the record. (See pages 63, 64, 65, 66 and 68 to 71.)

Sixth, The City bonds were legally issued and held by the Railroad Company, until the compromise was made September 8th, 1857. (See record, 81 and 82.) And the bonds and subscriptions were compromised for about eigh t or nine cents on the dollar.

Seventh, That the compromise was void because the City Council had no power to make it, and because it was fraudulent in fact and in law.

Eighth, The former adjudication set up and relied upon by the City, is no bar to a recovery in this case.

Ninth, The judgment is not stale. It is in full llfe, so that execution could issue upon it at any time. The Railroad Company, in its answer in Lindley case, November 10th, 1866, (see record, 162.) *acknowledged of Record that the judgment was unpaid.*

Tenth, The bonds owing by the City will not fall due until 1874, hence it cannot be said they are stale, and a fraudulent attempt at settlement cannot make them so.

PORTER & HARRISON,
AND S. BURKE,
Counsel for Appellants.

THE CITY OF NEW ALBANY

vs.

JOHN P. PUTNAM, et al.

Memoranda for Argument.

The N. A. & S. J. R. R. Co. was organized on the 22d of August, 1853, to build a railroad from New Albany to the State line of Ohio.

On the 20th day of September, 1854, the Company executed one hundred and ten bonds of $1,000 each, drawing 7 per cent., and having coupons attached and falling due on the first day of January, 1865. (See Record, p. 36.)

These bonds were secured on certain real estate of the Company at New Albany, which had been received upon stock subscriptions, and which was not wanted for railroad purposes.

William S. Pinson, Jr., and Harvey Seymour were made trustees in this mortgage.

By a supplemental agreement, dated the 7th day of October, 1854, (p. 43), it was provided that upon default of the payment of the interest on these bonds when due, the bonds should fall due.

The Railroad Company sold *sixty-seven* of these bonds to Charles and Sebre Howard for work on the road, and of these the Howards sold fifty-three to the complainants and those under whom they claim. (See Record, pp. 47, 48, 49.)

The balance forty-three of these bonds remained in the hands of the Railroad Company until the default of payment of interest in July, 1857, and were on the day of 1857,

turned over by the Directors to each other to secure them for $2,200 indebtedness each of them on that day assumed or became liable for the Railroad Company to the creditors of the Roilroad Company.

On the 22d of August, 1857, Victor A. Pepin, one of the Directors and the holder of its bonds as security as aforesaid, and also holder of twelve bonds which he had purchased of the Howards, commenced a suit in the Circuit Court of Floyd County, Indiana, to foreclose said mortgage to Pinson & Seymour, and recover a judgment upon the bonds for the amount his due. In this action he made the Railroad Company, Pierson & Seymour, and all of the Directors of the Railroad Company, and all other holders of bonds of which he had knowledge, parties.

He did not make the complainants in this case, nor either of them, nor any one of the holders of the fifty-three bonds now represented by them, parties.

The Trustees, Pierson & Seymour, filed an answer on which judgment was rendered, November 14, 1867, in their favor, for the use of the complainants in the sum of $54,855. (See Record, p. 49.)

The City on the 19th of November, 1853, subscribed for $400,000 of the capital stock of the Railroad Company, payable on the call of the Railroad Company in the bonds of the City, due in twenty years, drawing interest at six per cent. semi-annually.

Of these bonds $200,000 in all were delivered to the Railroad Company in payment of the subscription $100,000 before and $100,000 after the ordinance of ratification adopted by the Common Council, March 7, 1855. (See Record, p. 77.)

That the City had no legal authority to subscribe for stock when it did so may be conceded. To cure this defect on the 21st of February, 1855, the Legislature of Indiana passed an act expressly conferring such power. (See Record, p. 65.)

On March 7, 1855, the City, by ordinance, duly ratified the subscription, whereby it became legal and valid. (See p. 65.)

The City also ratified the subscription by levying taxes to pay the interest upon said bonds, by issuing $100,000 of the bonds January 1, 1856, some ten months after the Legislature conferred authority to ratify, and by voting upon its stock at every election of officers and directors. (pp. 71 and 112.)

That on the 16th day of August, 1857, $80,000 of said bonds so issued by the city were in the hands of the Ohio Insurance Company as a pledge for about $36,000, loaned by it to the Railroad Company, the balance of the $200,000 in bonds, except $7,000 which had been sold by the Railroad Company, remained in the hands of the Railroad Company undisposed.

Negotiations were then entered into which resulted in the City agreeing to pay the above debt of $36,000, and the Railroad Company in consideration thereof delivered up $193,000 in bonds of the City so held, with interest accrued, and cancelled the City subscription for $200,000 more. (See Record, pp. 87 and 88.)

When this settlement was made and the bonds finally surrendered the Pepin suit in which complainants' judgment was recovered, was pending, the suit having been commenced August 22, 1857, and the settlement being finally closed September, 1857. (See Record, p. 89.)

The Railroad Company was then, and had been for months, utterly insolvent and unable to pay its debts. This was well known to the City and the Railroad officials. (pp. 87 to 89.)

It was also well known that the real estate embraced in the mortgage was totally insufficient to pay the indebtedness of complainants and others secured thereon. This fact is but faintly contested. It appears from the fact that the Directors required so large an amount of bonds to secure so small a debt, and being fearful of loss, took a mortgage of indemnity upon all the remaining real estate of the Railroad company, and from the low price at which these real estate bonds were then held, and from many other facts. (See pp. 08, 178–9.)

None of the complainants or those under whom they claim had any notice whatever of this compromise between the City and Railroad Company until about the first of January, 1868, when this bill was filed.

So far as the City of Albany is concerned, but two questions are presented: *first*, did the City become indebted to Railroad Company by its subscription ratification? And if it did, was such indebtedness cancelled by the compromise above named?

Preliminary to the discussion of these questions other questions presented by the Record should be disposed of:

First, Did the complainants or those under whom they claim recover valid judgments on their bonds, &c., in the Pepin case?

Second, Did the judgment or decree in the Lindley case cancel the judgment of the complainants recovered in the Pepin case, and if not cancelled by that decree, how much remains due upon it?

Third, Have not the complainants slept so long upon their rights and suffered their demand to become so stale, that a court of equity would not enforce it?

And lastly, Has the United States Circuit Court of Indiana jurisdiction to entertain a bill to enforce a judgment of a State Court?

That complainants recovered a valid judgment appears clearly from the Record, p. 49.

It has always been so treated by the State Court where rendered. (See pp. 166–7.)

The decree or judgment in the Lindley case did not affect complainants' judgments here sought to be enforced for the following reasons:

1. There was *no issue* in that case upon the question of payment or satisfaction of the Pepin judgment.

2. There was no issue of any kind or upon any subject between complainants or those under whom they claim and the Railroad Company. The Railroad Company in that case, in its answer filed less than fifteen months before this bill was filed, adopted the answer of these complainants as its own and admitted that the judgments were unpaid, and that it was insolvent and had no means of paying them. (See pp. 128 to 132, and 262.)

3. The decree or judgment relied upon, rendered in the Lindley case, is fraudulent. No such question was in fact made before the Court. (See pp. 119 to 121, and 132 and 162.) There is no truth in such finding. (pp. 132, 58, 73, 83 to 85, 182 to 184.) It contradicts the record in the case and the admissions of record of the Railroad Company. (See pp. 132 and 162.)

The Directors themselves took a judgment and order of sale for lands embraced in second mortgage, how could this be if their debts were satisfied as the decree recites in the Lindley case?

That such a judgment constituted no estoppel is well settled.

That such judgment is not aided by the parol evidence is clear, because,

1. Such parol evidence is not admissible, it contradicts the record.

2. Such evidence is false. There could have been no such agreement made or sworn to, as the answers were not filed until February 18, 1868, some sixty days after all the evidence was put in. (See Record, p. 164.)

3. No one pretends that the Railroad Company proposed to plead payment, and no one pretends that there was any proof of payment offered.

As to the question of statements, see brief, pp. 31, 32, 55, 56 and 57.

As to the statute of frauds, see pp. 58 and 59 of brief.

The amount due on the judgment is the balance over what the land sold for as found by Master. (See Record, pp. 58, and 83 to 85, and 74.

That the Circuit Court in Indiana has jurisdiction to entertain this bill is clear. (See brief, pp. 7 and 8.)

It thus clearly appears that there is a large amount due to complainants on their judgment and that the Railroad Company has no means of payment, and that the United States Circuit Court had full jurisdiction in the case.

This brings us to the question, Did the City become indebted by the subscription, &c.?

We say it did. (See brief, pp. 9 and 10.)

That compromise was not valid. (See brief, 11 to 15, and 54 and 55.)

As to necessary parties, &c., see brief, 60 to 63.

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